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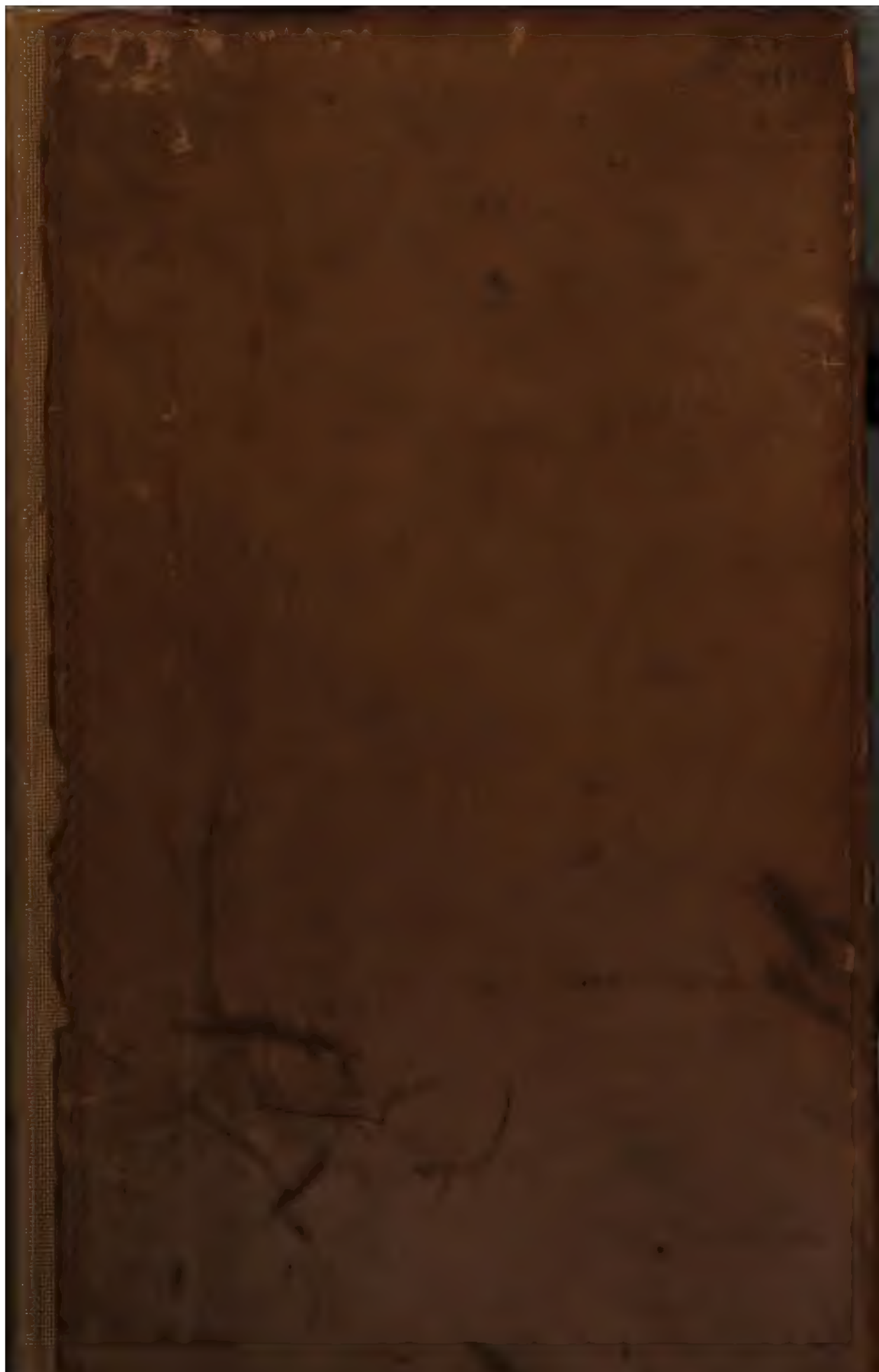
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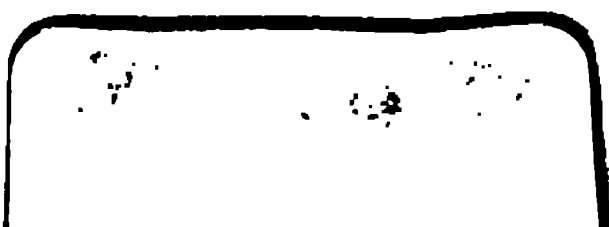


See. per. A. 18. 133.

CW. J. K.

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P. 135.4



R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED
IN THE
Courts of Common Pleas
AND
Exchequer Chamber.

G. WOODFALL, ANGEL COURT, SKINNER STREET, LONDON.

R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED
IN THE
Courts of Common Pleas
AND
Exchequer Chamber.

WITH TABLES OF THE CASES AND PRINCIPAL MATTERS.

BY
HENRY BLACKSTONE,
OF THE MIDDLE TEMPLE.

V O L. II.

From MICHAELMAS Term, 32d GEORGE III. 1791,
To HILARY Term, 36th GEORGE III. 1796, both inclusive.

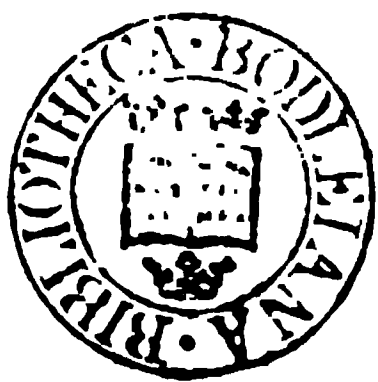
THE FOURTH EDITION.

WITH ADDITIONAL NOTES AND REFERENCES TO THE
SUBSEQUENT DECISIONS.

LONDON:

JOSEPH BUTTERWORTH AND SON, LAW-BOOKSELLERS,
43, FLEET-STREET.

1827.



THE Reporter having now brought his work to a conclusion, submits it with deference to the judgment of the Profession, in hopes that the Reader will view with an indulgent eye, whatever defects he may discover in the performance of a difficult and laborious undertaking.

June 14th, 1796.

1779



J U D G E S

OF THE

COURT OF COMMON PLEAS

DURING THE PERIOD COMPRISED IN THIS VOLUME.

Right Honourable ALEXANDER Lord LOUGHBOROUGH, Lord
Chief Justice.

Right Honourable Sir JAMES EYRE, Knt. Lord Chief Justice.

Honourable Sir HENRY GOULD, Knt.

Honourable JOHN HEATH, Esq.

Honourable Sir JOHN WILSON, Knt.

Honourable Sir GILES ROOKE, Knt.

Honourable Sir SOULDEN LAWRENCE, Knt.

Honourable Sir FRANCIS BULLER, Bart.

C A S E S

ARGUED AND DETERMINED

1791.

IN THE

Court of COMMON PLEAS,

IN

Michaelmas Term,

In the Thirty-second Year of the Reign of GEORGE III.

VINCENT *against* BRADY.

Friday,
Nov. 18th.

THE Defendant in this case having become a bankrupt, and obtained his certificate, was arrested on a promissory note, given by him before his bankruptcy. In consequence of this, a rule was granted to shew cause why he should not be discharged out of custody on entering a common appearance, in pursuance of stat. 5 Geo. 2. c. 30. s. 7. which directs, that
“ In case any such bankrupt shall afterwards be arrested, prosecuted, or impleaded, for any debt due before such time as he, she, or they became bankrupt, such bankrupt shall be discharged upon common bail”, &c.

Where a certificated bankrupt is arrested for a debt due before his bankruptcy, the Court will not discharge him on entering a common appearance, on stat. 5 Geo. 2. c. 30. s. 7. (a) if it appear that his certificate was obtained by fraud.

Affidavits were read on shewing cause, stating that the Defendant's certificate was obtained by palpable fraud, many fictitious creditors having proved debts under the commission, and others having received money for signing the certificate. One of the affidavits was of the Defendant himself, made by him, last term, in the case of *Sumner v. Brady* (b), and setting forth the fraudulent means by which the certificate was obtained.

Marshall, Serjt., contended that the benefit of 5 Geo. 2. c. 30. s. 7. was taken away, if the certificate were obtained unfairly,

(a) [Similar provision in the new Act, 6 Geo. 4. c. 16. s. 126.]

(b) Antè, Vol. I. 647.

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VINCENT
against
BRADY.

or by fraud, and by 24 *Geo. 2. c. 57. s. 9.* such certificate was declared to be void. And he cited *Martin v. O'Hara, Cowp. 823.* and *Sowley v. Jones, 2 Black. 725.*

Adair, Serjt., argued in support of the rule, that the Defendant was intitled to be discharged on a common appearance, by the terms of the stat. 3 *Geo. 2. c. 30. s. 7.* that he was not obliged to remain in prison till the time of the trial, when, and not before, it was to be proved whether or not the certificate were fraudulently obtained.

But the Court were clearly of opinion that the Defendant was not intitled to his discharge, as it plainly appeared from his own affidavit, that the certificate was obtained by fraud.

Rule discharged with costs.

Monday,
Nov. 21st.REDRIDGE *against* PALMER.

Where, to an action of trespass, the Defendant pleads a special plea of justification to the whole declaration, and the verdict is against him, the Plaintiff is intitled to full costs, although the damages are less than 40s. and the judge, at the trial, does not certify (a).

IN this action of trespass, the declaration, which contained only one count, stated that the Defendant with force and arms broke and entered a certain close of the Plaintiff, called the *Yard*, situate, &c. and *then and there* broke down, prostrated, &c. two wooden fences, &c. and the materials thereof, to wit, 500 pales, &c. took and carried away, &c. and also *then and there* pulled down, spoiled and destroyed a certain hogstye, &c. and the materials thereof, to wit, 50 cart-loads of wood, &c. took and carried away, &c. and *then and there* ejected, expelled, and put out the Plaintiff from the possession, &c. of his said close, &c.

The Defendant pleaded, First, not guilty; Secondly, a plea of licence to all the trespasses mentioned in the declaration; on both of which pleas issues were joined.

These issues came on to be tried before Mr. Baron *Hotham*, at the last *Lent* assizes at *Kingston*, for the county of *Surrey*, when, on each of them, a verdict was found for the Plaintiff, with one shilling damages, and 40s. costs; but the judge did not certify. The prothonotary having allowed full costs to the Plaintiff, a rule was granted to shew cause why the taxation should not be reviewed, on the ground that as the damages

(a) [Accord. *Peddle v. Kiddle*, 7 T. R. 659. *Comer v. Baker*, post. 341. See also *Stead v. Gamble*, 7 East, 326.]

were

were under 40s. and there was no certificate, the Plaintiff was intitled to no more costs than damages.

Against this rule, *Kerby*, Serjt., shewed cause; arguing, 1st, that where there was an *asportavit* of personal chattels, though in the smallest degree, joined with the trespass, and a verdict found for the Plaintiff, he was intitled to full costs, (the case being out of the statute 22 & 23 Car. 2. c. 9.) by the following authorities; in some of them in express terms, in others, by necessary inference. 2 *Show.* 258. *Sir Thomas Raym.* 487. *Sir Thomas Jones*, 232. S. C. 1 *Salk.* 208. *Carth.* 225. 2 *Ventr.* 48. 2 *Bac. Abr.* 513. 2 *Com. Dig.* tit. *Costs*, 446. 2dly, It was the constant practice, never departed from by the officers of the court (a), to tax full costs to the Plaintiff, wherever a special plea of justification was pleaded, and found against the Defendant. And this was supported by 2 *Ventr.* 295. 2 *Ld. Raym.* 1444. 2 *Com. Dig.* 547. *Barnes*, 129 (b) and also by *Page v. Creed*, 8 *Term Rep. B. R.* 391. which was trespass for assault and battery; the Defendant justified the assault only, and the Plaintiff obtained damages under 40s. but the judge did not certify, and the Plaintiff had no more costs than damages: but the Court held, that if the plea of justification had extended to the battery as well as the assault, no certificate would have been necessary, the justification being tantamount to it. 3dly, A certificate was not necessary in this case, since it appeared on the record by the plea of licence, that the trespass was wilful (c).

Bond, Serjt. *contra*. The statute of *Gloucester* having given costs where damages were recoverable at common law, wherever the smallest damages were recovered the Plaintiff obtained his full costs. This was productive of so much inconvenience by encouraging vexatious suits, that it was the object of the Legislature, in subsequent statutes, to confine the operation of the statute of *Gloucester*. The Court therefore will not be anxious to extend the construction of the stat. 22 & 23 Car. 2. to the present case. As to the cases cited on the other side, to shew that an *asportavit* of personal chattels carries costs, the modern

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(a) This was stated in Court by the prothonotaries, to be the uniform course in their office.

(b) Last Edit. 8vo.

(c) But whatever might have been collected from the whole record, prior to the stat. 8 & 9 W. 3. c. 11,

qu. Whether the only proper mode by which it can appear, since the passing that statute, that the trespass was wilful and malicious, be not the certificate of the judge, according to sect. 4. of that statute?

1791. **REDRIDGE** authorities of *Clegg v. Molyneux* (a) and *Mears v. Greenaway* (b) sufficiently prove, that where the *asportavit* is coupled with the rest of the count, in the same manner as in the present declaration, it is not considered as a distinct injury, but part of one trespass, and therefore does not intitle the Plaintiff to full costs.

**against
PALMER.**

[4] With respect to the argument, that wherever a special plea is found against the Defendant, the Plaintiff has full costs, it is a proposition which is by no means warranted by the statute; besides, if in the pleading that is involved which might have brought the title to the freehold in question, there must be a certificate from the judge, to give the Plaintiff a right to costs. Here the title to the freehold might have come in question, but there is no certificate.

Lord LOUGHBOROUGH on this day declared, that, after due consideration, the Court were of opinion that whatever question might be made on the true construction of the statute, as to the *asportavit* of personal chattels, yet as the practice had been uniform for a great length of time, above 100 years, it would be highly inconvenient to disturb it. The rule therefore, which had so long prevailed in both this court and the King's Bench, namely, that where there was a special plea of justification found against the Defendant, the Plaintiff was intitled to his full costs, ought not to be overturned.

Rule discharged.

(a) Dougl. 779. 8vo. Edit.

(b) Antè, Vol. I. 291.

Wednesday,
Nov. 23d.

WHITEMAN *against* KING.

A. being possessed of a quantity of land in a common field and having a right of common over the

whole field, and B. having also a right of common over the whole field, they enter into an agreement, for their mutual advantage and convenience, not to exercise their respective rights for a certain term of years, and each party covenants to that effect. If during the term the cattle of B. come upon the land of A. he may distrain them damage feasant; And may in his replication (in answer to a plea pleaded by B. of his right of common, in bar of the cognizance of A.), set forth the special circumstances of the agreement and covenants [and leave the construction of them to the Court].

REPLEVIN for taking, on the 20th of November 1790, at Holt, in the county of Norfolk, in a certain place called Holt-Field, one gelding and three mares of the Plaintiff, &c. &c.

Cognizance, that the *locus in quo* was an open and common field, that one Anne Peters was seised in fee of 10 acres of land, being in and parcel of the said field; that on the 25th of

March

March 1790, she demised the same to the Defendant *King*, for one year, and so from year to year, &c. &c., and acknowledged the taking the cattle, damage feasant, &c.

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Plea in bar, admitting that the said place called *Holt-Field*, in which, &c. was an open and common field, and that the cattle were taken in the said parcel of the said field demised to the Defendant; that the said parcel of the said field, in which, &c. at the said time when, &c. lay, and from time whereof, &c. hath lain open to other parts of the said field, &c. and not inclosed or divided therefrom by any hedge or fence whatsoever; that one *Robert Jennis* was seised in fee of a messuage and 60 acres of land in the parish of *Holt*, &c. that he and all those whose estate he hath (prescribing in a *que estate*) have had and used, &c. common of pasture for all his and their commonable mares and geldings, *levant* and *couchant*, &c. in and over the *locus in quo* (specifying the times of the year, and the mode of enjoying the common, with reference to the sowing the field with corn) as belonging and appertaining to the said messuage and land with the appurtenances: That the said *Robert Jennis* on the 15th of *November* 1782, demised the said messuage, &c. to the Plaintiff for 14 years; that the Plaintiff entered, &c. and (according to the specified terms of the prescription) put the cattle in the declaration mentioned, being his commonable gelding and mares *levant* and *couchant*, &c. into and upon the *locus in quo*, &c. and that the said cattle were and continued, &c. until the Defendant of his own wrong, &c.

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The second and third pleas varied in a few circumstances of the prescription, and stated that *Robert Jennis* was seised of 50 acres of land, &c.

The fourth stated, " That in *Holt-Field* the lands of divers persons from time immemorial had lain, and still lay dispersed and intermixed in small parcels, and not inclosed or divided, the one from the other, by any fences or inclosures whatsoever; that *Robert Jennis* was seised in fee of 50 other acres of land; that as well as the last mentioned 50 acres of land, as also divers and many other parcels of land, of divers and many other persons, at the said time when, &c. did lie, and from time immemorial had lain dispersed in the said field, and were not inclosed or divided, the one from the other, by any fences or inclosures whatsoever; and that from time immemorial the mares and geldings of the respective owners of the said last mentioned

1791. mentioned 50 acres of land with the appurtenances, parcel, &c. and of their farmers and tenants thereof for the time being, *levant* and *couchant* upon the said last mentioned 50 acres of land, and depasturing and feeding there yearly and every year, from *Michaelmas* day, according to the said old style, in case all the corn growing before corn-harvest in such year, in the said field whereof, &c. hath been before that time cut down, taken and carried away from thence, and if not, then from the time that all the corn growing before corn-harvest in such year, in the said field whereof, &c. hath been cut down, taken and carried away from thence, until *Lady-Day* then next following, according to the same old style, have used and been accustomed to stray and escape out of the said last mentioned 50 acres of land, into all the other parts of the said field whereof, &c.; which have so laid open and uninclosed, and were not divided, as aforesaid, by any fences or inclosures whatsoever, and which have not within that time been sown with any kind of corn, and *to intercommon* there; and that for and during all the time aforesaid, the mares and geldings of the respective owners of all other parts of the said field whereof, &c. (the last mentioned 50 acres excepted) which have so during all the time aforesaid lain open and were not inclosed and divided, as aforesaid, by any fences or inclosures whatsoever, and of their farmers and tenants of such respective parts of the said field, so lying open and not inclosed or divided as aforesaid, respectively, for the time being *levant* and *couchant* upon such their said respective lands, and feeding and depasturing there yearly and every year from *Michaelmas-day* according to the said old style, in case all the corn growing, before corn-harvest, in such year in the said field whereof, &c. hath been before that time cut down, taken and carried away from thence, and if not, then from the time that all the corn growing before corn-harvest in such year in the said field whereof, &c. hath been cut down, taken and carried away from thence, until *Lady-day* then next following; according to the same old style, have used and been accustomed to stray and escape out of the said respective lands of the respective owners of such mares and geldings, into all parts and parcels of the said last mentioned 50 acres of land, parcel, &c. so lying and having lain open, and not inclosed or divided, as aforesaid, by any fences or inclosures whatsoever, which have not during that time been sown with any kind of corn, and

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and to *intercommon there*, which said several strayings, escapings, and intercommonings have been during all the time aforesaid *called and known by the name of Shack.*"

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The demise of the said 50 acres of land from *Robert Jennis* to the Plaintiff *Whiteman* was then set forth, &c. and "That as well the said parcel of the said field in which, &c. as the said last mentioned 50 acres of land, parcel, &c. so lying and being open, &c. and all the corn, &c. being cut down and carried away, the said cattle in the said declaration mentioned being the commonable geldings and mares of the said Plaintiff *Whiteman*, *levant* and *couchant* upon his said last mentioned 50 acres, and feeding and depasturing there, &c. &c. strayed and escaped from the said last mentioned 50 acres of land, into the said parcel of the said field in which, &c. the same then, and from thence until, &c. lying open, and not being inclosed or divided as aforesaid, and not being then, nor from thence until, nor at the said time when, &c. sown with any kind of corn whatsoever, and for the cause aforesaid there continued and remained, from thence until the said Defendant *King* of his own wrong, &c. &c. &c."

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The replication, *as to the said several pleas*, &c. protesting against the right of common of *Robert Jennis*, as in the said *three first pleas* is severally mentioned, protesting also that the mares and geldings of the said respective owners and farmers of the said 50 acres of land in the said plea last mentioned, &c. have not from time immemorial intercommoned, &c. stated "That before and at the time of making the articles of agreement hereafter mentioned, and also at the said time when, &c. the said Plaintiff *Whiteman* was an occupier of half year land in the said parish of *Holt* in the said county; and that after the making of the said several demises by the said *Robert Jennis*, &c. and before the said time when, &c. to wit, on the 1st of *September* 1783, by certain articles of agreement indented, made between the Defendant *King* of the one part, and the Plaintiff *Whiteman* and divers other persons being owners and occupiers of half year lands lying in the parish of *Holt* aforesaid, of the other part, (with a profert of the counterpart,) reciting, that by virtue of a lease granted to *King* by *Joshua Smith*, clerk of the farm called the *Fold-Course*, in the parish of *Holt*, for the term of 21 years, of which 12 years would remain and be unexpired on the 10th of *October* then next, he (*King*) was in-

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titled to and had a right to feed and depasture his flock of sheep in, over, and upon the common heaths and waste grounds within the said parish, at all times of the year, and also in, over, and upon the common fields and other half year lands within the said parish of *Holt*, from twelve o'clock at noon on the 10th of *October*, to twelve o'clock at noon on the 5th of *April* in every year during the continuance of the said lease (except from time, and at all times when the same should be sown with wheat or rye); and also reciting, that the occupiers of half year lands in the said parish had a right to feed and depasture their great cattle at large, in, over, and upon, all the said common heaths and waste grounds, and also in, over, and upon the said common fields and other half year lands, (except, &c. as aforesaid) during the said time in every year that the same were subject to be fed by the said flock of sheep; and reciting, that for the improvement of the land in the said open fields, it had been the practice for some years then past, by general consent, to sow several pieces or parcels of land lying together in the same field (called a shift), and belonging to different occupiers with turneps, whenever the said lands came in course for that purpose, and to inclose and separate the whole of the said shift from the next adjoining lands with hurdles, lifts, or faggots, &c. that the turneps there growing might not be trespassed upon, or promiscuously fed, by the said flock of sheep or great cattle going at large, but preserved for a crop, for the use or disposal of each respective owner thereof, satisfaction being made to the occupier for the time being of the said *Fold-Course*, for the *shackage* of the said turneps. But some disputes having then lately happened, on account of the proportion of fencing materials which ought to be provided by each respective owner of turneps growing in the said fields, for inclosing and preserving them in manner above mentioned, tending to defeat the said practice; in order therefore to remove and prevent all causes of complaint and dissensions relative to the premises, by some means that might render the inclosing turneps in the said field totally unnecessary, and make them and the said half year closes and inclosures more useful and convenient to the occupiers thereof, by exempting the whole from the said flock of sheep and great cattle going at large, and being promiscuously depastured thereon, during the remainder of the said lease; it was agreed by and between the
 said

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said Plaintiff and Defendant, and the said other persons whose hands and seals were subscribed and set to the said indenture, that for the consideration in the said articles of agreement mentioned, *all the said half year land so occupied by them, should yearly and at all times of the year during the said term, be exempted, freed and discharged from being fed and depastured, not only by or with the said flock of sheep, or any other sheep belonging to the said Robert King (the Defendant), his executors, administrators, or assigns, but also by or with the great cattle going promiscuously or at large: And that the said half year land should, during the said term, in all respects be considered and used as whole year land, and be separately fed and depastured by the sheep and great cattle of the respective occupiers thereof, or such as they should take to pasture only.*

A covenant was next recited, that neither of the parties should nor would, during the said term of 12 years, *turn any sheep or other cattle loose into or permit them to go at large in the common fields, or on other half year lands lying in the parish of Holt aforesaid, but feed and depasture them upon the lands in his or her respective occupations only, &c.* There was then an averment, that the Defendant had not fed or depastured with sheep or great cattle, any of the common fields or half year lands in the said parish, and that his sheep and great cattle had not gone promiscuously over the said common fields or half year lands, (except the half year land of him the said *Robert King*,) but that the said *Robert King* had wholly abstained from feeding or depasturing with sheep or great cattle, any of the common fields or half year lands in the said parish, except his own half year lands; that the lease granted to *Robert King* (the Defendant) in the said articles of agreement mentioned, and the term of 12 years therein also mentioned, were in force and unexpired: that the said place called *Holt-field*, in which, &c. whereof the said land of the said *Robert King* was parcel, before and at the time of the making of the said articles of agreement, and also at the said time when, &c. was and still is an open common field in the parish of *Holt* aforesaid, and the said land of the said *Robert King* parcel, &c. before and at the time of making of the said articles of agreement, and at the said time when, &c. was half year land in the parish of *Holt* aforesaid, and that at the said time when, &c. the said cattle in the said declaration mentioned were turned loose and going at large on the
said

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1791. *said land of the said Robert King parcel of the said common field, &c. contrary to the said articles of agreement, and the covenant of the said John Whiteman (the Plaintiff), &c. &c.*
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To this replication there was a general demurrer, which was argued by *Runnington*, Serjt., on the part of the Plaintiff, as follows:

The question in this case is, whether under all the circumstances, the Plaintiff can be legally considered as a trespasser, so that the Defendant can justify the taking his cattle as a distress, damage feasant? But this cannot be, since it is admitted by the pleadings, that both parties had an equal right of common; and it is a clear rule of law, that though a commoner may distrain the cattle of a stranger damage feasant, yet he cannot those of his fellow commoner; for where there is only a colour of right in the one to put in the cattle, there cannot be a distress taken by the other. *Hall v. Harding*, 4 Burr. 2426. *Atkinson v. Teasdale*, 3 Wils. 278. 2 Black. 817. but the remedy is by an action on the case. *Ibid.*

[10] And secondly, The right of the Plaintiff was not released by the covenant. No interest passes by a bare covenant, *Poph.* 140. *Fulcher v. Griffin*, where “the parson of a parish covenanted with one of his parishioners that he should pay no tithes, for which the parishioner covenanted to pay to the parson an annual sum of money, and afterwards the tithes not being paid, the parson sued him in the Court Christian, and the other prayed a prohibition: and it was agreed that if no interest of tithes pass, but a bare covenant, then the party who is sued for the tithes hath no remedy but a writ of covenant: And the better opinion of the Court in this case was, that this was a bare covenant, and that no interest in the tithes passed.” So also in *Deur v. Jefferies*, *Cro. Eliz.* 352. “Where to debt on an obligation the Defendant pleaded, that the Plaintiff had covenanted that he would not sue on the bond before *Michaelmas*, the Court held that the covenant did not enure as a release, and could not be pleaded in bar, but that the party was put to his writ of covenant, if the other sued before the time.” To the same effect likewise is *Ayliff v. Scrimshire*, 1 Show. 46 (a).

(a) But the principle, on which those cases of personal contracts were decided, seems to have been, that if the covenant not to sue had been

construed to be a temporary release it was a perpetual one, because a personal action if once released is entirely gone.

The

The most that can be contended in the present case is that the right was suspended. But if it were suspended for a moment, it was so for the whole term. Now as it is a right appurtenant to the possession, if the Plaintiff had surrendered the lease to his lessor, and he had made a fresh demise to another tenant, that subsequent tenant could not be bound to the agreement. It would not even bind the assignee of the Plaintiff, notwithstanding the word "assigns" is used; for the contract was personal. *Shep. Touch.* 179.

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But supposing the Defendant to have been right in considering the Plaintiff as a mere stranger and a wrong-doer, yet the distress could not be supported, unless expressly reserved and consented to by all the parties to the deed. *Co. Litt.* 143. *Dott. & Stud. dial.* 2. c. 9. So a penalty inflicted by a bye-law may be levied by distress, but only in case where such remedy is appointed for the recovery thereof, by the power that made the bye-law, and at the time when it was made; because the bye-law binds only the members of that community who make it, and consequently the penalty may be recovered by distress, where the parties themselves have agreed to that remedy. But unless the distress be expressly provided for by the corporation, the penalty can be only recovered by action of debt. *5 Co.* 64. a. *Dyer.* 321. pl. 23.

[11]

Le Blanc, Serjt., *contra*. Although it be true, that one commoner cannot distrain the cattle of another, yet that rule is to be understood as applicable, only where the right of each is equal, and that no more than a right of common. But in the present case *King*, the Defendant, is owner of the soil, subject to a right of common in *Whiteman* the Plaintiff, and other persons at certain times. Now, by the deed the land was discharged from that right during the term; and then the common law right of distress was restored to the owner of the soil. The cases therefore between mere commoners cannot be applied to the situation of the owner of the soil and a stranger, which *Whiteman* was during the term. With respect to the argument, that no power of distress is given by the deed, *King* took the distress, not by virtue of the deed, but in his character of owner of the soil, upon whom all his common law rights attached.

LORD LOUGHBOROUGH. There is no difficulty in this case. The avowant had originally a clear right in respect of his property

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 ———
 WHITEMAN
 against
 KING.

perty to distrain cattle damage feasant. The right of the Plaintiff is also stated which he might have had, but which he agreed by the deed under his hand and seal not to exercise: with regard to the avowant therefore he was a stranger. The consequence is that the avowant had a right to distrain. And I think there would have been no difficulty in pleading this agreement as a release.

GOULD, J., of the same opinion.

HEATH, J., of the same opinion.

WILSON, J. I think there was in this case, a release or extinguishment *pro tempore*, of the Plaintiff's right, and that it might have been pleaded as such. I take it to be a clear rule in pleading, that a party may state a deed and leave it to the Court to determine what is the operation of it (a). If the legal operation of the deed is misstated, the plea is bad; but if the deed is only stated without its legal operation, it is good. My Brother *Runnington's* argument would be good, if the right were a mere personal interest. Here there is an agreement in the deed that the land shall be exempted. It is therefore not like the case in *Popham*, supposing that case to be law; for there the parson only agreed that he would not demand the tithes.

Judgment for the Defendant.

(a) [That a deed ought to be pleaded according to its legal operation, see *Baker v. Lade*, 3 Lev. 291.

2 Saund. 97. b. (n.) 5th Edit. *Moore v. Earl of Plymouth*, 3 B. & A. 70.]

[12]

Saturday,
 Nov. 26th.

DAVIDSON against Lord FOLEY and Others.

Where a warrant of attorney has been given to confess a judgment to

ON the 4th of *February*, 1774, the Defendants in consideration of 700*l.* paid to them by the Plaintiff, executed a bond

secure an annuity (together with other securities) the memorial must state the warrant of attorney, as well as the other securities. Nor is there any difference, in this respect, whether the annuity were granted and the warrant given *before* or after the 17 Geo. 3. when the annuity act passed (a).

(a) [Under the stat. 17 Geo. 3. c. 26, the date of the annuity deed must be set forth, *Ex parte Chester*, 4 T. R. 694. So the whole proviso for redemption, *Ex parte Ansell*, 1 Bos. & Pul. 62. *Steadman v. Purchase*, 6 T. R. 757. *Appleby v. Smith*,

3 Anstr. 865. See *Dalmer v. Barnard*, 7 T. R. 250. But the memorial of an annuity granted since 53 Geo. 3. c. 141. need not state that the annuity is redeemable, *Yems v. Smith*, 3 B & A. 206. If any one of the deeds constituting the assurance is

to the Plaintiff, in the penalty of 1400*l.* conditioned for payment of an annuity of 100*l.* a year to the Plaintiff; and at the same time a warrant of attorney was given to confess judgment, which was entered up as of *Easter Term*, 14 *Geo. 3.* On the 31st of *May* 1785, a memorial was inrolled in the Court of Chancery, stating the bond and the judgment, but taking no notice whatever of the warrant of attorney. In the year 1786 writ issued on the judgment, and a moiety of the Defendants were delivered to the Plaintiff.

A rule having been granted, in last *Trinity Term*, to shew why the judgment and all subsequent proceedings, together with the writ of *elegit*, should not be set aside, on the ground that the warrant of attorney was not stated in the memorial. *Adair* and *Rooke*, Serjts., shewed cause (*a*). By the 17 *Geo. 3. c. 26. s. 1.*, it is enacted that “a memorial of every deed, bond, instrument or other assurance, whereby an annuity should be granted after the passing the act, shall be inrolled in the Court of Chancery”, &c. By the 1st section, the case of annuities granted before the passing of the act is provided for, and that section enacts, “That before judgment should be entered of record upon any warrant of attorney for recovering or securing the payment of any annuity or rent charge, that had been then already granted, before any execution should be sued out or action brought on any such judgment then already entered, or any deed, bond, instrument, or other assurance then already executed for the purposes aforesaid, a like memorial of the deed, bond, instrument, or other assurance, should be inrolled in the Court of Chancery”, &c. Now it is evident from this clause of the statute, (by which the present case must be decided), coupled with and referred to the preceding one, that the only deed, bond, instrument, or assurance, which is required to be set forth in the memorial, is that by which

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against
Lord Foley.

properly enrolled (under 17 *Geo. 3.*) all the instruments are void. See *Bolton v. Williams*, 4 Bro. 510. 2 Ves. J. 154. *Hart v. Hart*, 6 T. R. 476.] It was at first objected that in consequence of a bill depending in Chancery, filed by the Plaintiff against the Defendants, and the trustees and

executors of the late Lord *Foley's* will, an ejectment was brought in the Exchequer by order of the Lord Chancellor on the *elegit*, and therefore that this Court ought not to proceed in the cause till the ejectment had been tried. But this objection the Court over-ruled.

the

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 ———
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the annuity was *granted*. But a warrant of attorney is not of that description; nothing is *granted* by it, it is merely an authority * to enter up judgment, and is completely *functus officio* when judgment is entered in pursuance of the authority. This transaction happened before the passing of the act 17 Geo. 3. c. 26.; the parties did all that the law as it then stood, required of them; they could not possibly foresee what regulations parliament might think proper to make on such subjects; it could not occur to them that it was necessary to preserve the warrant of attorney, when the purpose for which it was given was answered; it might therefore be accidentally lost or mislaid, without the smallest imputation on the parties; and surely the legislature did not mean, by retrospect, to invalidate a security, merely because a useless instrument was not forth-coming. The Court therefore will not, it is presumed, put such a construction on the act as will be productive of so great a hardship.

Le Blanc, Serjt., for the rule. The object of the statute was, as appears from the preamble, to bring to light transactions of this kind which had become a general inconvenience from the secrecy with which they were conducted. It therefore directs that all the circumstances relating to such transactions should be disclosed: the dates of the several instruments, the names of all the parties, the sums to be paid, the consideration, &c. must all be set forth and specified. It is, therefore, contrary to the intent of the legislature that any instrument whatever respecting the annuity, should be kept back. Besides, a warrant of attorney is a deed; it is an instrument under seal, and therefore within the terms of the act. As to the argument that when judgment is entered it is *functus officio*, it is no more so than the bond when judgment is entered, and yet the bond must be inrolled: but if one may not be omitted, neither may the other. In *Downes v. Parkhurst* (a), this Court set aside a judgment to secure an annuity, because the date of the warrant of attorney was not stated in the memorial.

The Court took time to consider, till this day, when Lord *Loughborough* declared, that the reason for their hitherto delaying to pronounce their judgment was, that a similar case (b) was depending in the King's Bench, which was now decided, and with which decision this Court fully concurred; and that

(a) Hil. 30 Geo. 3. (b) *Hopkins v. Waller*, 4 Term Rep. B. R. 463.

they

ere of opinion that the objection made to the memo-
the present case was well founded, and not to be ob-

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against
Lord FOLLY.

Rule absolut e

[14]

Monday,
Nov. 28th.

GODING *against* FERRIS.

S was an action of trespass, for seizing, taking and
rrying away, at *Cowes* in the *Isle of Wight*, a lug sail
f the Plaintiff, together with her furniture, tackle, &c.
vers other goods and chattels of the Plaintiff, to wit, 500
n casks, 200 gallons of brandy, &c. &c. *under pretence*
the same were forfeited, and were seized as forfeited by the
stant under and by virtue of some or one of the laws relating
Majesty's customs: Whereby, &c. &c. The second count
r seizing the boat and goods, &c. generally.

Defendant pleaded not guilty, on which issue was joined.
ssue came on to be tried before Lord *Loughborough*, at
t assizes at *Winchester*, when it appeared in evidence that
zure was made by the Defendant, who was mate of the
ell *Cutter*, belonging to the Custom-house, on the 11th
y 1787, on the high seas in *Shorcham Bay*; that it was
ed into the Court of Exchequer in the name of the De-
t, where proceedings were had to condemn the seizure,
at on the 26th of *February* 1789, the Plaintiff obtained a
f delivery out of the Court of Exchequer which was not
ed, he not having given the usual security in double the
sed value according to an order of that court (b): that
9th of *August* 1790, a notice was delivered to the De-
t dated the 6th of *May* 1790, of the Plaintiff's intention

An action
cannot be
maintained
against of-
ficers of the
customs, for
seizing
goods as
forfeited by
the revenue
laws, unless
it be brought
within three
months after
the actual
seizure;
notwith-
standing a
suit is insti-
tuted in the
Court of
Exchequer
for the con-
demnation
of the goods,
which is de-
pending at
the expira-
tion of the
three
months (a).

So it has been held that tro-
l not lie for goods seized, if the
is brought after three months
he original seizure, though
three months from the grant
rit of delivery under which
ly of the goods had been de-
. *Saunders v. Saunders*, 2
154. See also *Smith v. Wilt-*
B. & B. 622. *Crook v. M'Ta-*
Bingh. 170. But where a con-
tial damage is the cause of
the action may be brought
the limited period computed
he happening of such damage.

Roberts v. Read, 16 East, 215. on
the Highway Act, 13 Geo. 3. c. 78.
s, 81.]

(b) On the 26th of *February* 1789,
the Plaintiff obtained an order from
the Court of Exchequer for the writ
of delivery to issue without giving se-
curity. On the 2d of *March* 1789,
the order was amended by adding,
that the writ of delivery should issue
on giving the usual security in double
the appraised value. But no pro-
ceedings were had on the last order,
nor was it served on the claimant's
attorney.

to

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 GODIN
 against
 FERRIS.

to commence this action, in pursuance of stat. 23 Geo. 3. c. 70. s. 30., and 24 Geo. 3. Sess. 2. c. 47. s. 35. On the 30th of September the action was commenced by suing out a *capias ad resp.*

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It was objected by the counsel for the Defendant, that the action was not commenced *within three months next after the matter or thing done*, nor *within three months next after the cause of action arose*, as required by the statutes above mentioned. Lord Loughborough was of this opinion, and it was agreed that a verdict should be found for the Defendant, subject to the opinion of the Court on those points; for which purpose an order of *Nisi Prius* was made. And a rule having been granted for the Defendant to shew cause why the verdict found for him should not be set aside, and instead thereof a verdict returned on the back of the record for the Plaintiff;

Adair and *Rooke*, Serjts., shewed cause. On the true construction of the statutes on this subject, the limitation must begin to run from the time of the actual seizure, which is the time when the cause of action arose; otherwise the statutes which were meant for the protection of revenue officers would be rendered nugatory. Where indeed by proceedings in a court of competent jurisdiction the Plaintiff's right of action is suspended, it is a different case; but here, unless it can be shewn that the proceedings in the Exchequer were a bar to commencing the action, the Plaintiff ought to have commenced it within three months from the actual seizure, and if those proceedings were a bar, as they are still depending, there is an end of the question. He had it in his power to gain possession of the goods by means of the writ of delivery, which vested the right of possession in him on giving the security required; but the Plaintiff's neglect to do so cannot in justice be imputable to the Defendant, so as to make him a trespasser by the detention subsequent to that writ, as a substantive cause of action. Neither could any evidence be given of what was not contained in the notice (a), clearly therefore no evidence of a detention subsequent to the date of the notice, could be received.

Lawrence, and *Cockell*, Serjts., argued in support of the rule, that though the legislature had limited the time of bringing the action to three months "next after the matter or thing done", yet the subsequent detention was to be considered as part of the

(a) 23 Geo. 3. c. 70. s. 30.

same act as the seizure. So an imprisonment and detaining in prison are considered as constituting the same act. 1 *Salk.* 420. *Coventry v. Apsley*, *Comb.* 26. *Aldridge v. Duke*. By *stat.* 24 *Geo.* 2. *c.* 44. *s.* 8. it is provided, that no action shall be brought against any justice of the peace for any thing done in the execution of his office, unless commenced within six calendar months after the act committed; and on this statute it is holden, that if a man be imprisoned by a justice's warrant on the first day of *January*, and kept in prison till the first day of *February*, he will be in time if he brings his action within six months after the first of *February*, for the whole imprisonment is one entire trespass. *Bull, N. P.* 24. *Pickersgill v. Palmer*. Though the goods were in the king's warehouse, yet they were put there by the officer who seized them, and the possession must be construed to be his. If the Plaintiff were obliged to sue within three months of the act done, he could not recover the special damage arising from the vexation of the suit in the Exchequer, and the long detention of the goods.

On this day, *Gould, J.*, declared, that after due consideration, the Court had no doubt but that the opinion which Lord *Loughborough* held at the trial was right, *viz.* that the time when the limitation of the three months was to commence, was to be reckoned from the actual seizure, that being the wrongful act or thing done, according to the meaning of the legislature.

Rule discharged.

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GODIN
against
FERRIS.

[16]

END OF MICHAELMAS TERM.

C A S E S

ARGUED AND DETERMINED

1792.

IN THE

Court of COMMON PLEAS,

IN

Hilary Term,

Thirty-second Year of the Reign of GEORGE III.

CHETT *qui tam* against RACHAEL CROSS.

*Saturday,
Jan. 28th.*

Defendant having been arrested and holden to bail in penalties to the amount of 200*l.* incurred by insuring the last *Irish* lottery, a rule was granted to shew she should not be discharged on entering a common appearance, and the bail-bond given up to be cancelled. The grounds in which the rule was moved for, were two, 1. That the bail to hold to bail was insufficient, because it stated in positive that she “*insured or caused to be insured, (b)*” &c. 2. That she was a married woman (c).

At first objection the Court held to be of no weight, as the allegation was sufficiently positive: but on the

motion to hold to bail on the lottery acts is sufficient, if it state that the Defendant “*insured, &c.*”

If a married woman be holden to bail (for the penalties incurred by insuring in the lottery) the Court will discharge her on entering a common appearance, if she make an affidavit of her coverture (a). “*insured or*

Edwards v. Rourke, 1 B. & P. 8. See also *Barfield v. De Pienne*, 2 Bos. & Pul. N. R. 380. *Luden v. Justice*, 1 Bingham 344.] (b) Stat. 22 Geo. 3. c. 47. 27 Geo. 3. c. 1. (c) This appeared from her own affidavit; but it also appeared that her husband resided at *Birmingham*, and she in *London*.

If the Plaintiff knowingly married woman, the Court will pay the costs of the discharge. *Wilson v. Wilson*, 10 B. & P. 307. The affidavit must be in positive terms that the defendant is a married woman, *Harvey v. Wilson*, 10 B. & P. 747. See Tidd's Pr. 1. Under what circumstances the Court will set aside a bail-

“ by divine Providence, Archbishop of *Canterbury*, Primate of
 “ all *England*, and Metropolitan, to whom the granting of that
 “ administration of right belonged, was in due form of law
 “ committed to *Susannah Palmer*, widow, and relict of the said
 “ *John Palmer*, to wit, at *London* aforesaid, in the parish and ward
 “ aforesaid, and the said *Susannah* being so constituted admini-
 “ stratrix, as aforesaid, he the said *William Vernon* afterwards,
 “ and before this same *Saturday* next after one month from the
 “ day of *Easter*, to wit, on the 15th day of *May* in the year last
 “ aforesaid, at *London* aforesaid, in the parish and ward afore-
 “ said, delivered and paid over, and caused to be delivered and paid
 “ over, to her the said *Susannah* as administratrix aforesaid, all
 “ and singular the goods and chattels, which were of the said *John*,
 “ which had ever come to the hands of him the said *William Ver-*
 “ non, and the said *William Vernon* says, that he hath not, nor
 “ on the day of exhibiting the bill of them the said *Timothy*
 “ and *William Curtis*, had, nor at any other time since, hath
 “ had any goods or chattels of the said *John* at the time of his
 “ death, except the said goods and chattels so delivered and
 “ paid over to the said *Susannah* as administratrix as aforesaid,
 “ and this he is ready to verify, wherefore he prays judgment
 “ if the said *Timothy* and *William Curtis* ought further to main-
 “ tain their aforesaid action thereof against him, &c. And the
 “ said *William* produces here in court the letters of adminis-
 “ tration of the said archbishop, so by him granted as afore-
 “ said, which testify the granting thereof in form aforesaid, the
 “ date whereof is the same day and year in that behalf afore-
 “ said. And for further plea in this behalf, by like leave of the
 “ Court here for that purpose first had and obtained, according
 “ to the form of the statute in such case made and provided,
 “ the said *William Vernon* says, that the said *Timothy* and *Wil-*
 “ liam *Curtis* ought not further to maintain their aforesaid ac-
 “ tion thereof against him, &c. because he says, that the said
 “ *John Palmer* died intestate, to wit, at *London* aforesaid, in the
 “ parish and ward aforesaid, and that he the said *William Ver-*
 “ non never was executor of the last will and testament of the said
 “ *John*, nor ever had or possessed any goods or chattels which
 “ were of the said *John*, save as executor of his own wrong, and
 “ that after the death of the said *John*, and before this same
 “ *Saturday* next after one month from the day of *Easter*, to wit,
 “ on the 14th day of *May*, in the year of our Lord 1789, admi-
 “ nistration

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VERNON
 against
 CURTIS
 in Error.

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against
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in Error.

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“ nistration of all and singular the goods, chattels and credits,
 “ which were of the said *John Palmer* deceased, who died in-
 “ testate, was by the right reverend father in God *John* by di-
 “ vine Providence Archbishop of *Canterbury*, Primate of all
 “ *England*, and Metropolitan, to whom the granting of that
 “ administration of right belonged, in due form of law com-
 “ mitted to *Susannah Palmer* widow and relict of the said *John*
 “ *Palmer*, to wit, at *London* aforesaid, in the parish and ward
 “ aforesaid; and the said *William Vernon* further says, that he
 “ the said *William Vernon* in the life-time of the said *John*
 “ *Palmer*, to wit, in the Term of *Saint Hilary*, in the twenty-
 “ seventh year of the reign of our lord the now king, before
 “ the king himself, at *Westminster*, impleaded the said *John*
 “ *Palmer* in a plea of debt for 3000*l.* upon a certain writing
 “ obligatory of the said *John Palmer*, sealed with his seal,
 “ whereby he acknowledged himself to be held and firmly
 “ bound to the said *William Vernon* in the said sum of 3000*l.*
 “ to be paid to the said *William Vernon*, when he the said *John*
 “ should be thereunto requested, in which said plea it was in
 “ such manner proceeded that afterwards, to wit, in that very
 “ same *Hilary* Term, in the twenty-seventh year aforesaid, the
 “ said *William* by the consideration and judgment of the said
 “ court, recovered against the said *John Palmer* in that plea,
 “ the said 3000*l.* and also sixty-three shillings for his damages,
 “ which he had sustained, as well by the occasion of the de-
 “ taining of the said debt, as for his costs and charges by him
 “ about his suit in that behalf expended, as by the record and
 “ proceedings thereof, remaining in the court of our said lord
 “ the now king, before the king himself, at *Westminster*, more
 “ fully and at large appears; which said judgment still remains
 “ in full force, strength and effect, no ways vacated, set aside,
 “ paid off, annulled, satisfied or discharged; and the said *Wil-*
 “ *liam Vernon* further says, that no goods or chattels which
 “ were of the said *John Palmer*, at the time of his death, have
 “ ever come to his hands *except goods and chattels to the value of*
 “ 794*l.* 13*s.* 9*d.*; *which are not sufficient to satisfy and pay the*
 “ *said debt and damages, and which are charged, bound and liable,*
 “ *to the payment and satisfaction thereof, and which he retains to-*
 “ *wards the payment and satisfaction thereof, and to which the said*
 “ *Susannah after the granting of the said administration, and be-*
 “ *fore the same Saturday next after one month from the day of*
 “ Easter,

“ Easter, to wit, on the 15th day of May 1789, at London afore-
 “ said, in the parish and ward aforesaid, duly assented,” &c.

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VERNON
 against
 CURTIS
 in Error.

On the two first pleas issues were joined, and to each of the two last there was a general demurrer.

The Court of King's Bench having given judgment for the Plaintiffs (3 Term Rep. B. R. 587.), a writ of error was brought and the assignment of errors was

“ That in the record and proceedings aforesaid, as also in
 “ the rendering of the judgment aforesaid, there is manifest
 “ error in this, because by the record aforesaid it appears that
 “ the judgment aforesaid was given for the said *Timothy* and
 “ *William Curtis* against him the said *William Vernon*, when by
 “ the law of the land that judgment ought to have been given
 “ for the said *William Vernon* against the said *Timothy* and
 “ *William Curtis*. There is also error in this, that it appears
 “ by the record aforesaid that judgment was given for the said
 “ *Timothy* and *William Curtis* against the said *William Vernon*,
 “ upon demurrer to the third plea of the said *William Vernon*
 “ to the declaration of the said *Timothy* and *William Curtis*,
 “ whereas that judgment ought to have been given for the said
 “ *William Vernon* against the said *Timothy* and *William Curtis*,
 “ because the said plea and the matters therein contained are
 “ sufficient in law to bar and preclude the said *Timothy* and
 “ *William Curtis* from further maintaining their aforesaid ac-
 “ tion against the said *William Vernon*, the said several matters
 “ therein alleged *having occurred previous to the time of such*
 “ *plea being pleaded*, as appears by the record of such plea; and
 “ such plea being pleaded in bar of further maintaining such
 “ action, therefore in that there is manifest error. There is
 “ also error in this, that it appears by the record aforesaid, that
 “ judgment was given for the said *Timothy* and *William Curtis*
 “ against him the said *William Vernon* upon demurrer to the
 “ fourth plea of the said *William Vernon* to the declaration of
 “ the said *Timothy* and *William Curtis*, whereas that judgment,
 “ by the law of the land, ought to have been given for the said
 “ *William Vernon* against the said *Timothy* and *William*, because
 “ the said plea and the matters therein contained are sufficient
 “ in law to bar and preclude the said *Timothy* and *William*
 “ *Curtis* from further maintaining their said action against the
 “ said *William Vernon*, the several matters therein alleged *hav-*
 “ *ing occurred previous to the time of such plea being pleaded,*

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“ as

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“ as appears by the record of such plea, and such plea being
 “ pleaded in bar of further maintaining such action; there-
 “ fore in that there is manifest error. There is error also in
 “ this, that judgment was given upon the said third plea for
 “ the said *Timothy* and *William Curtis* against the said *William*
 “ *Vernon as executor of his own wrong*, although it appears that
 “ *before such plea pleaded he delivered over all the assets of John*
 “ *Palmer which had ever come to his hands, to the rightful admi-*
 “ *nistratrix of the said John Palmer*, and that as soon as ad-
 “ ministration was granted to her; therefore in that there is
 “ manifest error. There is also error in this, that judgment
 “ was given upon the said fourth plea for the said *Timothy* and
 “ *William Curtis* against the said *William Vernon, as executor*
 “ *of his own wrong, to recover a simple contract debt of the said*
 “ *John Palmer, although it appears that the rightful administra-*
 “ *trix of John Palmer had before plea pleaded, and as soon as ad-*
 “ *ministration was granted to her, assented to the said William*
 “ *Vernon's retaining assets in respect whereof the action was*
 “ *brought, towards satisfaction of a debt of a superior nature, to*
 “ *wit, a debt on a judgment recovered in his Majesty's Court of*
 “ *King's Bench, by the said William Vernon against the said*
 “ *John Palmer, and although by the law of the land a rightful*
 “ *administratrix is bound to apply the assets of an intestate in*
 “ *discharge of debts of a superior nature before debts of an in-*
 “ *ferior nature; therefore in that there is manifest error,*” &c.

This was twice argued in the Exchequer Chamber, the first time in *Easter Term* last by *Wood* for the Plaintiff in error, and *Bower* for the Defendants; the second in *Trinity Term*, by *Gibbs* for the Plaintiff, and *Bower* for the Defendants. The substance of the arguments on behalf of the Plaintiff in error was as follows:—

At the death of the testator, the Plaintiff in error being a judgment creditor, but not intitled to administration, possesses himself of part of the effects, and the Defendants being simple contract creditors, bring their action against him as executor *de son tort*, before any administration is taken out. On this state of the case it is obvious that if the Defendants prevail they will gain an unlawful advantage, but if they do not, the Plaintiff will have no advantage to which the law does not entitle him; it being perfectly clear that a creditor by judgment has a legal right to the payment of his debt, in preference to a creditor by simple

simple contract. Although it seems to be taken for granted, that an executor *de son tort* cannot retain for his own debt, yet there is no express authority for this, except a position in 2 *Bac. Abr.* 390. which is not supported by the cases to which it refers. The principal authority on which that position seems to be founded, is *Coulter's case*, 5 *Co.* 30 *a.* but that case is not applicable to the present. There the Court held, "that an executor of his own wrong should not retain, for from thence would ensue great inconvenience and confusion, for every creditor (and chiefly when the goods of the deceased are not sufficient to satisfy all the creditors) would contend to make himself executor of his own wrong, to the intent to satisfy himself by retainer, by which others would be barred. And it is not reasonable that one should take advantage of his own wrong; and if the law should give him such power, the law would be the cause and occasion of wrong, and of the wrongful taking of the goods of the deceased," &c. But in that case there was no question made as to the priority of debts: and though it may be proper that an executor of his own wrong shall not take advantage of that wrong, and give himself a preference which the law would not give him, yet it does not follow, that the Court ought to take away from him the preference which the law gives to creditors of a superior over those of an inferior degree. As an executor is bound to satisfy judgment before simple contract debts, why should he not retain his own judgment debt, in preference to a debt by simple contract? But in fact it appears from examining the Roll, that no judgment was given in *Coulter's case* (which is misreported *Cro. Eliz.* 630.), but that a discontinuance was entered. There is therefore no decided authority to shew that an executor *de son tort* cannot retain for his own debt of a superior nature, against a creditor by simple contract. In 12 *Mod.* 471. Lord Holt says, "an executor *de son tort*, who is but an executor *de facto*, if he does lawful acts with the goods, as paying of debts in their degrees, it shall alter the property against the lawful executor; as if he pay just and honest debts, the rightful executor shall not avoid that payment; and yet it is an act done by one that has no right. It is true he is not quit against the rightful executor, but he shall maintain trover against him; but what shall he recover in damages? Only for so much as he has misapplied; and all that he has

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“ well applied shall be abated in damages.” And afterwards,
 “ if an executor *de son tort* gets 300*l.* of the testator’s goods,
 “ and pays it duly to a just creditor, there the lawful executor,
 “ in my opinion, shall not even maintain trover against the
 “ wrongful executor, because it is a good payment, and no *pre-*
 “ *judice to the executor.*” Here the Plaintiff in error has done
 no more than paying a debt, in its due course, and according
 to its degree, and therefore ought not to suffer because he has
 paid it to himself. This alone affords sufficient ground for a
 determination in his favour. But the third plea states that be-
 fore plea pleaded he delivered over the effects to the lawful
 executor. If this had been done before action brought, it
 would clearly have been a good defence. 1 *Mod.* 213. But the
 Plaintiff has not been guilty of any laches: no administration
 was granted till after action brought, and immediately upon its
 being granted he delivered over the effects to the rightful ad-
 ministratrix. It would be therefore highly unreasonable that
 he should be deprived of the benefit of this defence, when be-
 fore action brought there was no person legally entitled to re-
 ceive the effects, to whom he could have delivered them. The
 delay in granting administration, which he could not expedite,
 ought not to work so great injustice. The opinion of Lord
Holt, Salk. 313.(a), “ that if *H.* get the goods of an intestate
 “ into his hands, and administration be granted afterwards, yet
 “ he remains chargeable as a wrongful executor, *unless he deli-*
 “ *ver the goods over to the administrator before the action is*
 “ *brought,*” can only be fairly understood as decisive, where
 such delivery over is *possible*, that is, where administration is
 granted before the action is brought.

An executor *de son tort* cannot be liable both to the rightful
 administrator and a creditor. Now supposing the rightful ad-
 ministratrix in this case had brought an action of trover, the
 Plaintiff in error could not have pleaded to that action, that a
 creditor had brought another action against him, and that he
 was liable to that creditor; but as he is not liable to both, if
 such a plea would not be an answer to the action of the admi-
 nistratrix, the consequence is, that the plea in the present in-
 stance is an answer to the action of the creditor. It is plain
 from 1 *Sid.* 76. 2 *Show.* 373. *Freem.* 265. 2 *Ventr.* 180. 2 *Stra.*

(a) Which was relied upon by the Court of B. R. as decisive, 3 Term Rep.
 B. R. 590.

1106. *Andr.* 333. that if after action brought, and before plea pleaded, an executor *de son tort* take out administration, the *tort* is purged, and he may plead a retainer for his own debt, though the writ is not abated by taking out administration. If it be objected that the Defendant's own act cannot give him a defence after the action brought, it may be answered, that the grant of letters of administration is not the act of the Defendant, and the delivery over by him is merely the discharge of a duty. But it is not true, in point of fact, that a party cannot have, by his own act, a defence after action brought. The contrary seems to appear from *Sullivan v. Montague*, *Dougl.* 106.(a). If the defence in the third plea be over-ruled, the consequence might be, the setting aside the whole course of distribution and an injury to all the specialty creditors; for it would go to apply all the assets in the hands of the wrongful executor to the payment of a debt of an inferior degree, as he could not be liable to pay to the rightful administrator, and also to a specialty creditor. With respect to the fourth plea, it is sufficiently clear from the authorities already cited, that if administration had been granted to the executor *de son tort*, he might have retained for his own debt, especially as it was a debt by judgment; he might also have defended himself from the action of the simple contract creditor, by other specialty debts due to third persons; then there is no good reason why he should not have the same right to retain, since the legal administratrix has assented to the retainer, which, in substance and effect, is no more than if he had paid over the money to the administratrix, and she had immediately repaid him the amount of his debt.

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On the part of the Defendants in error, it was insisted upon, that an executor *de son tort* could derive no advantage from the wrongful character which he had thought proper to assume; that *Coulter's* case was a sufficient authority as to that point, and fully supported the position laid down in *Bacon's Abridgement*; that in *Coulter's* case also the Defendant was a creditor by bond in the nature of a statute staple, and therefore his debt was of a higher degree (b) than that of the Plaintiff, who sued only on a common bond, and yet the Defendant was not permitted to retain. The only ground open to argument is that which arises from the delivery over of the effects to the rightful administratrix, and her assent to the retainer. It is true that

(a) Last 8vo. edit.

(b) Stat. 23 Hen. 8. c. 6.

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an administration granted to an executor *de son tort* legalizes his previous acts, and gives him a right to retain; but that arises merely *ex necessitate*, from the same necessity which gives the general right to executors to retain for their own debts, namely, to avoid the absurdity and inconvenience of a man's bringing an action against himself. And delivery over of the effects, after action brought, cannot defeat the action which was well brought, nor abate the writ. If the effects had been delivered over before action brought, it would have been good, because it would support the plea of *plenè administravit*. *Salk.* 313. But the plea of *plenè administravit* must be of an administration before action brought (a): no subsequent payment can entitle an executor to the benefit of that plea. No person can have a plea *puis darrein continuance* by his own act; it must be either the act of law or of the Plaintiff that can intitle him to it. Nor can he by his own mere act, done after action brought, give himself a plea in bar of the action. Thus in *Bradbury v. Reynel*, *Cro. Eliz.* 565 (b), the Court held that the Defendant, having once made himself chargeable to the Plaintiff's action, as executor *de son tort*, could not afterwards discharge himself by matter *ex post facto*. The same principle is recognized in *Padget v. Priest*, *2 Term Rep. B. R.* 97. With respect to bankruptcy, release, &c. subsequent to action brought, from which the party may derive a plea, in those instances it is the operation of law, and not the mere act of the Defendant, which makes the benefit personal to himself. As to the argument drawn from the assent of the rightful administratrix, it cannot be law that such assent should give validity to the right of retainer claimed by the Defendant, so as to bar the Plaintiff's action, which was well founded when brought: and besides, such a defence, if admitted, would be often used as a colour for the purposes of fraud and collusion.

On this day, after consideration, Lord *Loughborough* declared

(a) In *Evans v. Prosser*, *3 Term Rep. B. R.* 186. it was holden "that a plea of set-off, that the Plaintiff was indebted to the Defendant *at the time of the plea pleaded*, was bad; but that it ought to have stated, that he was indebted at the *commencement of the action*;" in contradiction to *Reynolds v. Beerling*, *Mic.* 25 *Geo.* 3. *B. R.*, which case *Buller, J.*, said, he found could not be supported as to that

point. [Vide *Le Brett v. Papillon*, *4 East*, 502. *Lee v. Levy*, *4 B. & C.* 393.]

(b) But *quære* whether what is stated in *Bradbury v. Reynel* were true, *viz.* that the Court held, that if administration had been committed to the Defendant, it would *not* have purged the first *tort*? [See the cases collected in *3 T. R.* 589. See also *Picard v. Brown*, *6 T. R.* 551.]

the

the unanimous opinion of the Court, that whatever hardship or inconvenience there might be in the decision, yet as the law was settled, the Court ought not to overturn it. That on both the points rested upon in the argument, the law was established by a series of authorities from *Coulter's* case to that in *Salk*. 313. that an *executor de son tort* could not retain for his own debt, though of a superior nature, nor could he avail himself of a delivery over of the effects to the rightful administrator, after action brought, nor of the assent of the administrator to his retainer, so as to defeat the action of the creditor.

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Judgment affirmed (a).

(a) At the close of the first argument, a doubt was suggested by Mr. Justice *Gould*, whether the Stat. 43 *Eliz. c. 8. s. 2.* had not given an executor *de son tort* a general right to retain for his own debt, and the counsel for the Defendants in error were desired to advert to that statute, previous to the second argument.

Afterwards *Bower* said, that, according to the desire of the Court, he had looked into the statute, but that it appeared to him clearly to relate only to the case of fraudulent administrations, which it was designed to prevent. To which opinion the Court seemed to assent.

END OF HILARY TERM.

CASES

C A S E S

ARGUED AND DETERMINED

1792.

IN THE

Court of COMMON PLEAS,

IN

Easter Term,

In the Thirty-second Year of the Reign of GEORGE III.

FIELD *qui tam* against CARRON.

Wednesday,
April 25th.

ADAIR, Serjt., moved for a rule to shew cause, why the proceedings in this action (which was against the keeper of a lottery-office for the penalties incurred by insuring tickets (c), should not be staid, till the Plaintiff give security for costs, on an affidavit of his insolvency and extreme indigence. But the Court said, they had already gone as far as they could in actions of this kind, by preventing the issue money from being paid to the Plaintiff, and ordering it to be placed in the hands of the prothonotary (d): that to require a security for costs would be directly contradicting the acts of parliament, which gave the penalties to whoever would sue for them, without imposing any such condition.

The Court will not require the Plaintiff in a *qui tam* action to give security for costs, though it appear by affidavit that he is insolvent (a). In such a case, the proper mode for the Defendant to pursue, is to move the court that the issue-

Rule refused.

money should be paid into the hands of the prothonotary (b).

(a) [Accord. Bull. N. P. 196.]

(b) [As to payment of the issue-money, *vide ante*, vol. 1. p. 254, note (a).]

(c) Stat. 22 Geo. 3. c. 47, and 27 Geo. 3. c. 1.

(d) This is the course in *qui tam* actions if the Defendant apply for it by motion. The same practice also prevails in B. R. 3 Term Rep. B. R. 157.

SHRUBB

1792.

Friday,
May 11th.

If there be two Defendants in an action of *assumpsit*, one of whom suffers judgment by default, and the other obtains a verdict, he who obtains the verdict is also intitled to costs.

SHRUBB *against* BARRETT and Another.

IN this action of *assumpsit* for goods sold and delivered, one of the Defendants suffered judgment to go by default, and the other gained a verdict; but the judge did not certify that there was reasonable cause for making him a Defendant, according to *stat. 8 & 9 W. 3. c. 11. s. 1(a)*. The prothonotary having allowed costs to him who obtained the verdict, a rule was granted to shew cause why the taxation should not be reviewed. *Watson*, Serjt., who moved for the rule, contended that before the passing the statute *8 & 9 W. 3. c. 11.* if there were two Defendants, and one suffered judgment by default, and the other had a verdict, he was not intitled to costs, the courts holding that the former statutes (*b*) which gave costs to Defendants, related only to cases in which all the Defendants had a verdict. This being found inconvenient, the *stat. 8 & 9 W. 3. c. 11.* gave costs where one of the Defendants was acquitted, unless the judge should certify. But that statute mentions only trespass, assault, false imprisonment and ejectment, and has been construed so strictly as not to extend to trespass on the case, *2 Stra. 1005.* to trover *Barnes 139 (c)*, to replevin, *3 Burr. 1284*, nor to an information, *Salk. 194*. The same construction therefore ought to prevail in the present action, which being *assumpsit*, is clearly an action on the case.

Le Blanc, Serjt., in shewing cause, urged that all the cases cited on the other side, were of actions founded on *torts*, between which and those on contracts of this kind there was this material difference, *viz.* that *torts* were joint and several, so that one Defendant might be acquitted, and the other found guilty; but that contracts being joint, where there were two Defendants in an action on a contract, one could not have a verdict, without a demonstration that there was no cause of a joint action against both. It was immaterial, therefore, that in the present case judgment went by default against one Defendant, since the other obtained a verdict. *1 Lev. 63*, *1 Siderf. 76*, *1 Keb. 284*, are authorities to this point in an action of covenant, and *Pract. Reg. C. P. 102*, in an action of *assumpsit*.

The Court were very clearly of this opinion, and therefore
Discharged the rule.

(a) Which indeed would have been rather singular, if it had been required.

(b) *23 Hen. 8. c. 15. 4 Jac. 1. c. 3.*
(c) 8vo. last edit.

LOVERIDGE,

1792.

Friday,
May 11th.LOVERIDGE, One, &c. *against* PLAISTOW.

RUNNINGTON, Serjt., shewed cause against a rule, to discharge the Defendant out of the custody of the sheriff of *Middlesex*, on the following circumstances. The *capias* was returnable in three weeks of *Easter*, viz. on *Sunday April* the 11th; on *Monday, April* the 30th, at eight o'clock in the morning, the Defendant was arrested, and detained by the officer till ten o'clock on that morning, at which time the Plaintiff renewed the writ. This *Runnington* contended was a legal detainer, though the arrest was void, being made after the former writ had expired (b). But the Court were of a different opinion, and therefore made the

If a person be arrested after the writ is returnable, the officer cannot legally detain him (though for the shortest time) till the writ be continued (a).

Rule absolute for the Defendant's discharge.

(a) [Accord. *Barlow v. Hall*, 2 Anstr. L. *Birch v. Procter*, 1 Bos. & L. N. R. 135. But third persons who find him in such custody have a right to consider him as being lawfully in custody, and to proceed against him accordingly. *Barclay v.*

Faber, 2 B. & A. 743. 1 Chitty's Rep. 579. S. C. and see the notes there, and Tidd's Pr. 217. 8th Edit.]

(b) Writs, therefore, which are returnable on a *Sunday*, must be executed, at latest, on the *Saturday* before.

WELSH *against* TROYTE.Friday,
May 11th.

A RULE was granted to shew cause why all the proceedings in this action, which was for coals, sold and delivered to the amount of 1l. 2s. 6d. only, should not be set aside, on the ground that as the demand was for a sum under 40s. the action ought to have been brought in the county, and not in this court. *Rooke*, Serjt., shewed for cause, that the Defendant lived in *Devonshire*, and that the sale and delivery of the coals was in *Hampshire*; that the action therefore could not be brought in the court of either of those counties; not in the former, because the cause of action arose in the latter, nor in the latter, because the Defendant lived in the former: for it was a rule of law that no suit could be brought in a county court unless both

An action cannot be brought in a county court, unless both the Defendant reside and the cause of action arise within the county, i. e. within the jurisdiction of the court. Therefore, though the demand be for less than 40s. if the

cause of action arise in one county, and the Defendant live in another, the action must be brought in the superior court (a).

(a) [Accord. *Tubb v. Woodward*, T. R. 175. *Busby v. Fearon*, 8 T. R. 235. *Smith v. O'Kelly*, 1 Bos. &

Pul. 75. *Harwood v. Lister*, 3 Bos. & Pul. 617.]

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WELSH
against
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the Defendant resided, and the subject-matter arose within its jurisdiction, *stat. West. 1. cap. 35. 2 Inst. 229, 230, 231.*

The cause having stood over, on this day *Lawrence*, Serjt., who moved for the rule, admitted that it could not be supported, the following authorities being against it; *viz. Dalton Sher. 412. cap. 110*, where it was said that "sheriffs in their county courts may examine, hear, and determine certain smaller personal actions, as of debts due upon contracts, &c. *assumpsit*, &c. happening, made, or done, within their county"; and *Hern's Pleader 493. 498.* where in proceedings in county courts, the cause of action was alleged to be "within the jurisdiction of the Court," &c.

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Rule discharged.

Saturday,
May 12th.

The Court will not set aside an execution issued on a judgment after notice of a writ of error, if it appear from the admission of the Defendant's attorney, that the writ of error was brought merely for delay (a).

MITCHELL against WHEELER.

A RULE was obtained by *Bond*, Serjt., to shew cause why an execution issued on the judgment in this case, after notice of the allowance of a writ of error, should not be set aside. *Kerby*, Serjt., shewed cause by producing an affidavit of the Plaintiff's attorney stating the proceedings, and an admission of the Defendant's attorney, that the writ of error was merely for delay, and to drive the Plaintiff into terms. This the Court held to be sufficient cause, as it appeared from the admission of the attorney himself, and therefore

Discharged the rule (b).

GREEN

(a) [*Accord. Pool v. Charnock*, 3 T. R. 79. *Law v. Smith*, 4 T. R. 436 (n). So if the attorney admit it in effect, though not in terms, *Miller v. Cousins*, 2 Bos. & Pul. 329. See also *Spooner v. Garland*, 2 M. & S. 474. *Hawkins v. Snuggs*, 2 M. & S. 476. *Eicke v. Sowerby*, 1 B. & C. 287. But where it did not appear but that the declaration of the Defendant that he would delay the Plaintiff was made before any action pending, the Court refused leave to take out execution after error brought. *Barkett v. Barnard*, 4 M. & S. 331. And in *Rawlins v. Perry*, 1 Bos. & Pul. N. R. 307, the Court would not allow the Plaintiff to take out execution pending a writ of error, merely because the Defendant's at-

torney had declared that the debt would be settled, and that time was all the Defendant wanted. So the Court set aside an execution issued, pending a writ of error sued out before final judgment signed, when the Defendant had six months previously declared that if the Plaintiff did not accept the terms then proposed, he should never have any thing, and that he (the Defendant) would ultimately bring a writ of error. *Redford v. Garrod*, 1 B. Moore, 253. 7 Taunt. 537. S. C. See *Tidd's Prac. 1202*, 8th edit. and *ante*, vol. 1. p. 432.]

(b) *Goodin v. Hammond*, Trin. 31 Geo. 3. C. B. A rule was obtained to shew cause why all proceedings should not be staid in an action

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Saturday,
May 12th.GREEN *against* CROFT and Others.

THIS was an action for money had and received to the use of the Plaintiff; the Defendant pleaded the general issue, and a verdict was found for the Plaintiff, for 1062*l.* 7*s.* 6½*d.*, subject to the opinion of the Court, on a case, the material part of which stated, that on the 27th of *December*, 1782, *George Huddleston*, by his will devised all his real and personal estates to the Defendants “*James Croft, George Huddleston, Jervoise Purefoy, and John Walker*, their heirs, executors, and administrators, in trust that they and the survivor of them, and the heirs, executors and administrators of such survivor, do and shall receive all and singular the rents and profits, interests *and dividends thereof, and pay and apply the nett annual produce, after deducting thereout all charges and expenses of setting, letting, and managing the same, to my nephew *John Green* (the Plaintiff) during his life; and after his death, to convey, assign, transfer, and pay the same to and amongst his children living at his death,” &c. that the same persons, who were thus appointed trustees, were also executors of the will; that the testator died on the 12th *February* 1784; that the annual value of his real estates, after deducting charges and expenses, was 284*l.* 6*s.* 7½*d.*, and of his personal, after making the same deduction, 778*l.*; that the Defendants received those two sums previous to the commencement of the action, and tendered and offered to pay the same to the Plaintiff *on his giving them a receipt or discharge upon such a stamp or stamps as is or are imposed by stat. 20 Geo. 3. c. 28. 23 Geo. 3. c. 58, and 29 Geo. 3. c. 51.* And the question for the opinion of the Court was, whether the Plaintiff was intitled to receive from the Defendants, both or either of the said sums of 284*l.* 6*s.* 7½*d.* and 778*l.* without giving a receipt or discharge for the same, or any

Where there is a devise to *A.* for life, of the rents and profits of a real estate, and the interest and dividends of personal property, and after his death, the whole estates, both real and personal, to be divided between *B.* and *C.*, the executors and trustees are bound to pay to *A.* the annual produce of the personal as well as real property, (especially if the personal property be money in the funds,) without requiring a receipt stamped as for a legacy; such annual payment not being subject to the tax (*a*) imposed on legacies. [By

stat. 20 Geo. 3. c. 28. 23 Geo. 3. c. 58.] *Quære*, whether in any case an executor can refuse to pay a legacy until a receipt or discharge be given?

action on a judgment, pending a writ of error. On shewing cause, it appeared that the Defendant in the original action had once taken out a summons to pay the debt and costs, which he afterwards deserted, and suffered judgment to go by default; and that the attorney admitted there was no error, but that the writ was

brought merely for delay. This being disclosed on affidavit, the rule was discharged with costs.

(*a*) [By stat. 20 *Geo.* 3. c. 28, 23 *Geo.* 3. c. 58, and 29 *Geo.* 3. c. 51, the duty was imposed upon legacies through the medium of the receipt, and not, as in the later statutes, immediately upon the legacy itself.]

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part thereof, on a legacy stamp, as required by the above cited statutes, or either of them?

On the part of the Plaintiff, *Le Blanc*, Serjt., made four points,

1. Whether a legatee were bound to give a receipt for his legacy?

2. Whether the statutes in question extended to an interest in lands?

3. Whether they extended to a life interest in personal property?

4. Whether the stat. 29 *Geo. 3. c. 51.*, which passed after the death of the testator, was applicable to this case?

[32] With respect to the first point, none of the statutes make it necessary that a receipt should be given, but only have the effect of declaring that no receipt shall be evidence of payment, unless it be properly stamped: it is not enacted that the payment of a legacy shall not be proved by other modes of evidence, as by witnesses who were present. If an action be brought to recover a sum of money, it is no defence for the Defendant to say that he offered to pay the money on condition that the Plaintiff would give him a receipt (*a*), which the Plaintiff refused; and such a tender would not be good. As to the second point, the word *legacy* in the statutes cannot be holden to extend to a devise of lands; the ordinary signification of it being the bequest of a sum of money in gross, and it is plain, that personal property alone was in the contemplation of the legislature, since the word *legacy* is followed by the words “any share or part of a personal estate, divided by force of the statute of distributions.” The sum, therefore, of 284*l.* 6*s.* 7½*d.* the produce of the real estates is quite out of the question, and to that the Plaintiff is clearly entitled. As to the third point, the word *legacy*, as used in the acts of parliament, cannot be fairly construed to include an annuity, in the nature of which, this bequest of the annual produce of the personal estate evidently was: for if the legislature had intended to charge that species of property with a stamp duty, they would probably have appointed some person in the stamp office to regulate it, as is done in the case of the duty on indentures of ap-

(*a*) But the obligor of a single bond is not bound to pay without an acquittance under seal: otherwise of a bond with condition, Bro. tit. Faits

pl. 8. 1 Vin. Abr. 192. Fortesc. Rep. 145. [The reason is, because payment was no plea at common law to debt on single bond.]

prenticeship (a). Suppose the testator had directed the dividends and interest of his personal estate to accumulate, the produce in that case could not be liable to the duty, for then interest upon interest would be charged. So if part of the interest were directed to be laid out in the maintenance of an infant during his minority, it could not be said in that case that a stamped receipt as for a legacy must be given for every payment. It was the intention of the legislature, that the gross amount of money which should be given by a testator away from his wife and children, should be liable to pay a duty, which duty, to prevent evasion, is to be charged on the receipt. But it was not intended to charge the produce which arises after the testator's death, or the dividends on the public funds, the receipts for which are not liable to any duty at all. And the Defendants in this case might have enabled the Plaintiff to receive the dividends at the Bank, by means of a power of attorney. Indeed it is plain, that every legacy is not within the meaning of the statutes, as, for instance, a specific chattel. Suppose, too, that goods were bequeathed to A. for life, remainder to B., A. could not be required to give a receipt for the value at which the use of them might be estimated (b).

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Lawrence, Serjt., for the Defendants. Wherever a legacy is liable to the duty, the legatee ought, in reason, to be compellable to give a receipt; for it would defeat the end of the acts of parliament, to hold them not to be compulsory. The definition of a legacy given by *Swinborne* (c), is "a gift left by the deceased, to be paid or performed by the executor or administrator"; and that the term legacy includes a devise of lands as well as a bequest of chattels, appears from *Shep. Touch.* 400. *Salk.* 415. *Bendl.* 60. This is in the nature of a legacy to be paid at different times, or by instalments, the same as if the testator had directed so much to be paid to the Plaintiff every half year: for if the increase is not a legacy, what is it? Nor is there any hardship in this construction; for the same property is not paid for more than once, if the duty is levied only

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(a) *Stat. 8 Anne, c. 9. s. 37.*

(b) The fourth point, *viz.* whether the stat. 29 Geo. 3. c. 57. which passed after the death of the testator, was applicable to this case, was not argued. Nor indeed was it very material, as that statute could only affect the quantum of the tax. But it

seemed to be admitted in the course of the argument, that if the legacy tax were to be paid at all, it must be such as was prescribed by that statute, though passed subsequent to the death of the testator.

(c) Part I. s. 6. p. 17.

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on what is received. Suppose the whole had been directed to accumulate during the life of the father, and after his death to be paid to the children, must not they have paid the legacy duty for such accumulation? In this case, all the payments make one gross sum, for which the duty ought to be paid. If a testator gives a legacy of a certain sum to be raised out of the rents and profits of his land, it would be clearly liable to the duty. It was the intention of parliament that all persons should pay the tax who were the objects of the testator's bounty; and it is incumbent on the Court to carry that intention into effect.

LORD LOUGHBOROUGH. The only question for us to consider is, whether a receipt under the legacy acts was necessary in this case. The Defendants might have empowered the Plaintiff to receive the money himself, which brings it exactly to the case of money had and received by them to the Plaintiff's use. Legacies charged on land are undoubtedly liable, but not a devise of land, or of an interest in the land. No receipt is given for land, and the Plaintiff in this case is tenant for life in equity, and might have received the rents from the tenants, for it would have been no imputation on the Defendants to have permitted him so to do. The intention of the legislature was to charge all pecuniary legacies, it being supposed that for them the executors would find it necessary to take receipts; and therefore where the executor can demand a receipt as executor, he may deduct it out of the legacy. But this is not a case where the executors can demand a receipt, for undoubtedly they might authorize the legatee to receive the dividends at the Bank, and if an action were to be brought afterwards by him for the dividends, it would be a sufficient defence for the executors that he had received them himself, of which the books of the Bank would be evidence. It is impossible to construe the words "*any legacy*" to mean *all* legacies, for it is plain they do not extend to specific chattels, as a horse or a piece of furniture. So a residue is out of the act of parliament, and accumulations *de anno in annum* are not subject to the tax, for if they were, it would be taxing interest upon interest. Suppose a legacy of 1000*l.* were given to *A.* in trust for an infant to go over in case he should die during his minority, and the infant dies; the interest during his life would belong to his representatives, and the remainder-man would be intitled to the principal. Now in that
case,

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case, would the interest be liable to the legacy duty? Or suppose the money was paid to a trustee by the executor and a receipt taken for the whole, would the remainder-man afterwards be liable? The act does not appear to me to charge the profits arising after the death of the testator, but only the gross amount at the time of his death. If this interest were liable, it would follow, that all dividends of the public funds transmitted by will to persons for life, would pay an annual tax; which would very much sink the credit of the funds. It is difficult to calculate the value of an annuity; and the calculation can only be made at the time when the annuity commences: besides, the annuitant may sell it. But the growing profits after a testator's death, are not subject to the tax. As this demand therefore is for nothing but growing profits, the Plaintiff must have judgment for the whole sum found by the verdict.

GOULD, J., of the same opinion. This bequest may perhaps be considered as a legacy to the children, with an exception in favour of the Plaintiff during his life.

HEATH, J. If the legacy tax were to be charged on the dividends of the public funds, it would be a breach of the national credit, and contrary to the acts of parliament creating them, which expressly provide, that they shall not be liable to any taxes or impositions whatsoever (a). It is a great error in the legacy acts that legacies themselves are not chargeable, but only the receipts for them.

WILSON, J. The legacy acts do not seem to me to extend to this case, nor to those cases where a receipt cannot be given, as where a legacy is bequeathed to an executor; in which case he could not give a receipt to himself.

Judgment for the Plaintiff for the whole sum found by the verdict.

(a) *Vide* stat. 3 Geo. 1. c. 7. s. 27. see statutes 36 Geo. 3. c. 52. 55
Runnington's Edit. and the other Geo. 3. c. 184.]
 statutes there referred to. [But now

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 against
 CROFT.

 KAY,

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Saturday,
May 12th.

KAY, ONE. &c. *against* WHITEHEAD.

Time to plead under a judge's order, is reckoned *inclusive* of the day of the date of the order, but *exclusive* of the day on which it expires (a).

ADAIR, Serjt., shewed cause against setting aside an interlocutory judgment signed in this case for want of a plea, on the following circumstances.

A rule to plead having been given, a summons for time was taken out; on *Saturday* the 28th of *April* a judge's order (b) was made for a week's time to plead; and on *Saturday* the 5th of *May* in the afternoon, judgment was signed. The question therefore whether the judgment was regular, depended on this, namely, whether the week's time to plead was to be reckoned inclusive or exclusive of the day when the order was made? The officers of the court being referred to stated the practice to be, that the time was reckoned *inclusive* of the day of the date of the order, but *exclusive* of the day when it expired; that the judgment therefore was regular (c). And

GOULD, J., cited from a MS. note, the case of "*Read v. Montgomery*, in this Court, *Easter*, 26 *Geo.* 3. where an order for time to plead was made on the 16th of *May*, and judgment signed on the 23d of that month for want of a plea, which the Court held to be regular on consulting the officers."

Rule discharged.

(a) [But see *Freeman v. Jackson*, 1 Bos. & Pul. 479. See also *Aspinall v. Smyth*, 2 B. Moore, 655. that where time to plead is given under a judge's order, such time is to be reckoned from the expiration of the time to plead and not from the date of the order. But see *Tidd's Pr.* 476. 8th Ed.]

(b) The order was drawn up in the

usual way, and nothing appeared on the terms of it decisive of the question.

(c) The practice in this court is, that the Plaintiff may sign judgment at the opening of the office in the afternoon of the day after the time to plead has expired. In B. R. he cannot do so till after 24 hours have passed from that time.

Monday,
May 21st.

NORTH *against* EVANS.

Of the four days allowed to perfect

LAURENCE, Serjt., shewed cause against setting aside an attachment against the sheriff for not bringing in the body bail after exception, the first is reckoned exclusively, and the last inclusively; so that where the exception was on *Wednesday*, an attachment could not regularly issue against the sheriff till the *Tuesday* following (*Sunday* being no day). But though the attachment did issue on the *Monday*, the Court would not set it aside, because the bail were not perfected (a).

(a) [See *Maycock v. Solyman*, 1 Bos. & Pul. N. R. 139. *Tidd's Pr.* 257. 8th Ed.]

on

on the following circumstances. Bail were put in on *Monday* the 30th of *April*, on *Wednesday* the 2d of *May* an exception was entered, and on *Monday* the 7th of *May* no bail being justified, the attachment issued. This, *Lawrence* contended, was regular, because he said the bail ought to have been perfected on the *Saturday* preceding, viz. *May* the 5th, the four days allowed for perfecting bail after an exception being inclusive. On the other hand, *Cockell*, Serjt., insisted that the attachment was too early; that the first of the four days was reckoned exclusively, and the last inclusively; and therefore that the attachment could not issue till *Tuesday*, *May* 8th, the preceding *Monday* being one of the four days. The Court declared themselves of this opinion, but as the bail were not in fact perfected, they said they could not allow the present motion, and therefore
Discharged the rule with costs.

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against
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CONCANEN *against* LETHBRIDGE.

Monday,
May 21st.

THIS was an action on the case against the sheriff of the county of *Somerset* for taking insufficient sureties in a replevin bond.

In an action on the case against a sheriff for taking insufficient sureties in a replevin bond, the Plaintiff may recover damages beyond the penalty of the bond, i. e. for more than double the value of the goods distrained (a).

The declaration consisted of two counts; the first stated that the Plaintiff on the 13th of *October* 1788 distrained goods and chattels of a large value, to wit, of the value of 21*l.* 4*s.* in the dwelling house of one *Thomas Jones*, for arrears of rent, to wit, for 10*l.* 10*s.* then due from the said *Thomas* to the Plaintiff, &c.; that the goods were replevied, a plaint levied in the county court, and pledges found to prosecute the said *Thomas Jones*, *William Lewis* and *Charles Lewis*, which plaint was removed by *re. fa. lo.* into the King's Bench; that in *Trinity* term 29 *Geo.* 3. the said *Thomas* impleaded the now Plaintiff on the said plaint in the King's Bench, that the now Plaintiff avowed the taking, &c. for the 10*l.* 10*s.* rent arrear, and that such proceedings were therefore had; that in *Michaelmas* term in the 31st year of *Geo.* 3. it was considered by the said Court that the said *Thomas* should

(a) [But it is now clearly decided that in an action against the sheriff for taking insufficient sureties, no more can be recovered against him than the party could have recovered against sufficient sureties, i. e. double

the value of the goods distrained. See *Evans v. Brander*, post. 547. *Baker v. Garratt*, 3 Bingham. 59. Willes, 375. (n). See *Scott v. Waithman*, 3 Stark. N. P. C. 171.]

take

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 against
 LEFK-
 BRIDGE.

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take nothing by his said writ, &c. &c. and that the now Plaintiff should have a return of the goods, &c. And it was also considered, &c. that the now Plaintiff should recover against the said *Thomas* 84*l.* which in and by the said court were adjudged to him according to the form of the statute in such case made and provided for his costs and charges, &c. That afterwards the now Plaintiff sued out a certain writ directed to the sheriff of the county of *Somerset*, whereby it was commanded to the said sheriff that he should cause a return to be made to the said Plaintiff of the said goods and chattels, &c. &c.; that the then sheriff returned that the goods and chattels were eloined, &c. &c. It was then stated, that the Defendant, so being such sheriff as aforesaid, and not regarding the duty of his office, &c., but fraudulently intending to defraud the Plaintiff, &c. and to deprive him of his said distress and of all benefit thereof, did not at or before the replevy of the said goods and chattels, &c. take from the said *Thomas* and two responsible persons as sureties, a bond in double the value of the goods distrained, &c. &c. And the Plaintiff further said that the said goods and chattels have not been returned to him, &c. nor the rent, for which the distress was made, paid, nor the judgment discharged or satisfied, nor had the said *Thomas Jones*, *William Lewis*, or *Charles Lewis*, or any other person whatsoever, answered for or paid to the Plaintiff the value of the goods and chattels distrained as aforesaid, or any part thereof; by reason of which said premises the Plaintiff is still deprived of the benefit of the said distress (a), &c.

The second count was nearly the same as the first, but concluded with stating, that the Defendant did not before, or at the time of replevy of the said goods and chattels, to the said *Thomas*, take from him pledges sufficient as well for the said goods and chattels so distrained, being returned, if a return should be adjudged, as for the said *Thomas* prosecuting his said complaint, which he ought to have done according to the form of the statute in such case made and provided, but neglected so to do, for that the said *Thomas Jones*, *William Lewis*, and *Francis Lewis* above mentioned to have been returned by the Defendant as such sheriff as aforesaid, at the time of their becoming pledges, were not sufficient to answer for prosecuting the said plaint, and

(a) It was not stated under the *per quod* either in this or the other count, that the Plaintiff had sustained damage by the costs of the replevin suit.
 for

for duly returning the said goods and chattels so distrained, in case a return should be adjudged; but the said *Thomas Jones*, *William Lewis* and *Charles Lewis* at the time of their being found by the said *Thomas*, and accepted by the said Defendant as such sureties, were and now are insufficient and totally irresponsible for that purpose, nor have the said goods and chattels been returned or delivered to the Plaintiff, nor hath the said judgment been yet discharged or satisfied, nor have the said *Thomas* and the said *William Lewis* and *Charles Lewis*, any, or either of them, or any other person answered to the Plaintiff for the value of the said goods and chattels so distrained, or of any part thereof, *by reason of which said premises the Plaintiff is deprived of the said goods and chattels, and of the whole benefit of the said distress, &c.*

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against
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At the trial it appeared that the rent in arrear was 10*l.* 10*s.* the costs of the replevin suit 8*l.* the value of the goods 22*l.* 4*s.* and the penalty of the bond 50*l.* An expense of 5*l.* also had been incurred, in the proceeding *de retorno habendo*.

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The Plaintiff had a verdict, with 100*l.* damages, subject to the opinion of the Court, as to what ought to be the extent of them.

A rule was granted to shew cause why the damages should not be reduced to the value of the rent distrained for, or to such other sum as the Court should think proper.

Against this rule, in a former term, *Adair* and *Watson*, Serjts., shewed cause.

The damage sustained and stated by the Plaintiff is, that he has lost the benefit of his distress. The sureties in the replevin bond engage, not only that the goods shall be returned, but that the Plaintiff shall prosecute his suit with effect. They are therefore liable to the extent of the penalty of the bond, not only for the value of the goods, but also for the costs of the avowant in proceeding for the rent in arrear. The sheriff therefore ought to be liable to the same extent, as the sureties would have been if they had been solvent. The declaration states amongst the *gravamina* the costs paid by the Plaintiff in the replevin suit, and concludes generally *per quod* he has lost the benefit of the distress, and sustained damage to the value of 100*l.* The costs of the replevin are incident to the distress, and when the Plaintiff loses the benefit of the distress, he loses the benefit of those costs. The benefit of the distress is, that he

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he shall have his rent with the costs of acquiring it. The costs necessarily follow the rent, and need not be separately claimed. The *per quod* referring to all the premises, it is unnecessary to repeat them at the close of the declaration. *Carth.* 451. *Salk.* 15. The cases of *Pattison v. Prowse* (a) and *Gibson v. Burnell* (b) were similar to the present.

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Rooke and *Lawrence*, Serjts., argued in support of the rule. The Plaintiff can recover no more than he would have had if the sheriff had acted right. Now the sheriff is to take a bond in double the value of the goods (c). If he had taken such a bond in this case, it would have been for no more than 44*l.* 8*s.* This is the farthest extent therefore to which the sheriff ought to be liable. But in the declaration the Plaintiff claims no more than the benefit of the distress, which, he alleges, he has lost by the Defendant's misconduct. Now the benefit of the distress can be no more than the value of the goods taken. The sureties are not liable for the costs of the replevin suit, but only to return the goods. If the goods are returned, the bond is not forfeited; as against the sureties, then, nothing could be demanded but the value of the goods. The costs of the replevin suit cannot be a special damage, arising from the act of the sheriff. He is not to take sureties for those costs, which were not given to the avowant till the stat. 21 *Hen.* 8. c. 19. gave them. But sureties *de retorno habendo* were directed by stat. *West.* 2. The 11 *Geo.* 2. c. 19. does not alter the nature of the obligation of the sureties, but only the form, and some part of its effect. But if the Plaintiff were intitled to recover these costs, as special damages, he ought to have stated them as such in his declaration. He states indeed in the count the judgment in replevin for the costs, not as a ground of claim against the Defendant, but to shew that the suit was determined, which was necessary to support the action. Before the Legislature (d) gave a power to sell the distress, the party distraining could only have kept it to compel payment of the rent.

Cur. advis. vult.

On the last day of the term Lord *Loughborough* said, that the Court had examined the roll in *Pattison v. Prowse*, where it appeared that the damages given by the jury for which judg-

(a) Bull. N. P. 602. *Crompt. Prac.* 238. [16 *Vin. Ab.* 400.]
(b) *Trin.* 20 *Geo.* 3. C. B.

(c) Stat. 11 *Geo.* 2. c. 19. s. 23.
(d) 2 *W. & M.* c. 5. 8 *Anne*, c. 15.
4 *Geo.* 2. c. 28. 11 *Geo.* 2. c. 19.

ment was entered, were made up of the costs of the replevin suit and the rent in arrear; the sum was precisely the same as was given for the damages and costs of the Plaintiff in the replevin suit. But there was a circumstance in that case, which was different from the present, *viz.* that the value of the goods was more than the sum for which the judgment was given; the value of them being 100*l.* but the whole amount of the damages and costs less than 100*l.* Here the value of the goods was 32*l.* 4*s.* which when doubled was considerably less than the damages found, which were compounded of the rent in arrear, the costs in the replevin suit, and the costs of the *retorno habendo*. But the Court would give the Plaintiff leave to enter up his judgment for the whole sum, subject to a condition that he should remit such part of it, as, upon a conference with all the judges, it should appear he had taken beyond what he was intitled to. That the Court were agreed that the Plaintiff would have a right to recover to the extent of *double the value of the goods*; but whether he could go beyond that, was a point upon which they were not agreed, and upon which they proposed to take the opinion of the other judges, it being a question of great importance.

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Cur. advis. vult.

The cause having stood over for some time,

On this day, Lord *Loughborough*, gave the judgment of the Court. After stating the facts, and observing, that it clearly appeared at the trial, that the Defendant knew the sureties to be insufficient at the time when he took them, his Lordship proceeded thus.

This case has been fully argued, and the Court has given it long and great consideration, a similar case having been lately decided in the Court of King's Bench (*a*), with which we cannot bring ourselves to concur. It was contended, in the argument, that the damages ought not to exceed the amount of the penalty of the replevin bond, and also, that the value of the goods limited the responsibility of the sheriff, because if he had done his duty, and taken sufficient sureties, the Plaintiff could not have recovered more than double that value. It will therefore be proper to take a view of the law on this subject, as it originally stood, and the subsequent alteration which it has undergone. At common law, the sheriff, on delivering the goods,

(*a*) *Yea v. Lethbridge*, 4 Term Rep. B. R. 433.

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took pledges to prosecute, who were to answer the amercement. By the statute *West. 2. (a)* "he who delivered the goods was also to take pledges for the return of the beasts or the price of them; and it appears from 2 *Inst.* 340. that if he took insufficient pledges, they were no pledges within that statute, and the sheriff was charged by it, as if he had taken no pledges at all." At that time, then, the sheriff was liable to answer the value of the goods. From thence down to the 21 *Hen.* 8. there could be no question as to costs, as there were no costs given to the avowant before the passing of the *stat. 21 Hen. 8. c. 19.* But it appears from 2 *Inst.* 107, and 341. that after judgment of return irreplevisable, the lord or avowant was not bound to return the cattle, unless not only the arrearages of rent were tendered, but also "all that was due upon the judgment in the avowry."

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Thus the law stood, till the act 11 *Geo. 2. c. 19.* was made, the last section of which was to remedy the mischiefs of vexatious proceedings in replevin. In this section also the case is supposed, that the bond, which is the additional security, might be forfeited. If so, the penalty is a debt, and judgment must be entered up to the extent of it; but in the same section there is an equitable jurisdiction given to the Court, to qualify the penalty by giving such relief to the parties upon the bond, as may be agreeable to justice and reason, by rule of Court, which shall have the nature and effect of a defeasance to the bond. This made a material alteration in the law with respect to the relief which the landlord has, where the replevying is vexatious; as the judgment is for the whole penalty, it must cover, according to the equitable jurisdiction of the Court, all that has been lost by the proceeding; there would be no equity, it would not be "agreeable to justice and reason", unless the whole were covered. If therefore an action were brought on the security given by the statute, the party would be entitled to the whole. The only question then is, how far he shall be entitled where he does not proceed upon the statute. In *Prowse v. Pattison (b)*, it was decided, after great doubt, that an action on the case would lie. What then is the measure of damages, in an action on the case against an officer for neglecting the duties of his office? What has the Plaintiff lost by the neglect? This is a culpable neglect, not merely a simple non-feasance, and must

(a) *Cap. 2.*

(b) *Bull. N. P. 60.*

have

have been accompanied with a bad intention. The rule then must depend upon what damages the party has sustained. The great doubt we have had, has been, whether we could go beyond the penalty of the bond. But this is the same sort of question as whether an action on the case would lie: and there is no rule which says, that in action on the case for an injury accompanied with a bad intent, less shall be recovered than the whole damage sustained. The verdict therefore must be entered for the whole sum found by the jury.

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END OF EASTER TERM.

CASES

C A S E S

1792.

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

IN

Trinity Term,

in the Thirty-second Year of the Reign of GEORGE III.

BROWN *against* LEESON.

Tuesday,
June 19th.

THIS was an action of *assumpsit* on a wager. The declaration stated, "That a certain discourse was had and moved between the Defendant and the Plaintiff, *on the number of ways* *nicking seven on the dice, allowing seven to be the main, and*

No action will lie on a wager respecting the mode of playing an illegal game;

such a cause be set down for trial, the judge at *Nisi Prius* will order it to be struck out of the roll).

[A wager upon the contingency of peace between this country and France with which we are at war, is illegal. *Lacause v. White*, 2 Esp. C. 629. So a wager upon a fight, and the judge will not try the cause. *Squires v. Whisken*, 3 N. P. C. 140. Or upon a dog-fight. *Egerton v. Furzeman*, 1 R. & M. P. C. 213. So also a wager, whether an unmarried woman has a child? and the Judge will stop the action. *Ditchburn v. Goldsmith*, 4 N. P. C. 152. and see Cowp. Nor will the Court try an action upon a wager on an abstract question of law, or judicial practice, arising out of circumstances realising, in which the parties have an interest. *Henkin v. Guerres*, 2 N. P. C. 409. 12 East, 247. It seems also that a wager between the proprietors of two carriages for the conveyance of passengers or hire, that a given person

should go by one of those carriages and no other, is illegal. *Eltham v. Kingsman*, 1 B. & A. 683., and see the observations of Abbott, J., *Ibid.* 688, as to the Judge refusing to try such questions, with regard to which, see also *R. v. Deacon*, 1 Ry. & M. N. P. C. 27. and *Burn v. Taylor*, *ibid.* (n).

But an action may be maintained upon a wager of a rump and dozen, whether the Defendant be older than the Plaintiff. *Hussey v. Crickett*, 3 Campb. N. P. C. 168. So a wager of less than 10*l.* upon a legal horse race. *M'Allester v. Haden*, 2 Campb. N. P. C. 438. So also a declaration on a wager, whether a certain agreement purporting to be subscribed by A., really was subscribed by him, is good after verdict. *Micklefield v. Hepgin*, 1 Anstr. 153.

As to the action against the stakeholder in case of an illegal wager Vide *ante*, vol. i. p. 65. note (a).]

"eleven

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“ *eleven to be a nick to seven.* That the Defendant asserted
 “ that there were *no more ways than six of nicking seven on the*
 “ *dice, allowing seven to be the main, and eleven to be a nick,*
 “ which assertion of the Defendant’s the Plaintiff denied, and
 “ thereupon both the Plaintiff and the Defendant agreed to
 “ refer and submit the determination of the said question in
 “ dispute to one *Walter Payne.* That thereupon, in consider-
 “ ation that the Plaintiff at the special instance of the Defend-
 “ ant had undertaken to pay him the sum of 105*l.* in case the
 “ said *Walter Payne* should determine that there were *no more*
 “ *ways than six of nicking seven on the dice, allowing seven to be*
 “ *the main, and eleven a nick to seven,* he the said Defendant
 “ undertook to pay the Plaintiff the sum of 105*l.* in case the
 “ said *Walter Payne* should determine that there were *more ways*
 “ *than six of nicking seven as aforesaid.*

“ That the said *Walter Payne* did determine that there were
 “ *more ways than six of nicking seven, &c.* by means whereof the
 “ Defendant became liable to pay the Plaintiff the said sum of
 “ 105*l.* of all which premises Defendant had notice,” &c.

The second count was similar to the first, omitting the reference to *Payne*. The third was for money had and received. Plea, the general issue. When the cause came on for trial, Lord *Loughborough* directed it to be struck out of the paper, as being of a nature highly improper to be made the foundation of an action; with a proviso, that it should be restored, in case the Court should, upon argument, be of a different opinion. Accordingly, a rule was obtained to shew cause why it should not be restored to the paper.

Against which *Le Blanc*, Serjt., shewed cause. He argued, that independent of the general question, which might be made as to the legality of a wager, in the subject of which neither party had an interest^(a), the circumstances of this particular transaction were such as made it a very unfit matter for discussion in a court of justice. The game of hazard being played with dice, is prohibited by a number of statutes, and any wager which leads to an open enquiry into the mode of playing that illegal game, by which the by-standers may acquire a know-

(a) But the simple circumstance of neither party having an interest in the subject-matter of a wager, does not seem alone sufficient to make the

wager illegal, according to the doctrine laid down in *Good v. Elliott*, 3 Term Rep. B. R. 693. [But see *Henkin v. Guerres*, 12 East, 247.]

ledge of it, is contrary to good morals and the policy of the law, and therefore not a ground on which an action ought to be maintained. Those statutes are, 33 *Hen.* 8. c. 9. s. 11. 12 *Geo.* 2. c. 28. s. 2. 13 *Geo.* 2. c. 19. s. 9. 18 *Geo.* 2. c. 34. s. 1 & 2. In *Atherfold v. Beard*(a), which was on a wager, whether the *Canterbury* collection of the duties on hops in one year, would amount to more than the collection in the preceding year, though the Defendant admitted that he had lost, yet the Court set aside the verdict, because the wager was contrary to sound policy, inasmuch as it led to a discussion which tended to expose to the world the amount of the revenue. The present case is much stronger as it leads to an enquiry *contra bonos mores*.

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The mode also of proceeding adopted at the trial, that of striking the cause out of the paper, was the proper one, because if it had been tried, such an inquiry must necessarily have taken place.

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Thus in *Jones*, assignee of *Knight*, v. *Parry*(b), Lord Mansfield nonsuited the Plaintiff the moment the case was opened. And a good distinction is made in *Brewster v. Kidgil*, 5 *Mod.* 368. and *Comb.* 424. 466. between feigned issues to try a real right, and those which are merely a cover for another transaction, which Lord Holt declared he would not try. Besides, this wager was void on another ground: it was laid on a thing which admitted of no doubt, being capable of demonstration; for it is a matter of certainty, how many times any two numbers can be thrown with a pair of dice.

Lawrence, Serjt., *contra*. This wager cannot be brought within the description of those which are *contra bonos mores*, there being no immorality in simply discussing the manner in which a game could be played. It was a mere matter of curiosity. So in *Pope v. St. Leger*, *Salk.* 344. a wager on the rules of the game of backgammon was holden not to be illegal. As to the cases of *Brewster v. Kidgil*, and *Atherfold v. Beard*, they chiefly proceeded on the ground that it was a contempt of the Court to try one question, merely as a feint to introduce the decision of another. But there is surely nothing which militates against good morals or sound policy, in discussing how many times 7 and 11 can be thrown on two dice, which is the simple question,

(a) 2 Term Rep. B. R. 610.

(b) Cited in *Allen v. Hearn*, 1 Term Rep. B. R. 58.

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abstracted from the cant terms *nick* and *main*. With respect to the striking the cause out of the paper, that mode seems to have been improper, because it prevents the Plaintiff from carrying the question, which was on the record, to a court of appeal.

Le Blanc replied, to the objection that the Plaintiff was prevented from going on to a superior court, that he had it in his power to bring a fresh action in that court; and to the argument drawn from *Pope v. St. Leger*, that in that case the bet was concerning a legal game, *backgammon* being excepted out of the statutes which prohibited other games at dice (*a*).

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GOULD, J. I think my Lord Chief Justice did perfectly right in refusing to try this cause. The game of hazard stands condemned by the law of *England*; there are many statutes which make it illegal, and nothing can be more injurious to the morals of the nation, than a public discussion of this nature, before an audience whose curiosity is whetted to attend the trial of such questions. The refusing therefore to try it was both laudable and legal. In *Da Costa v. Jones* (*b*), which was on a wager concerning the sex of *Madame D'Eon*, I believe Lord *Mansfield* refused to try it a second time; and I very well remember that the only ground on which Mr. Justice *Burnet* was thought to have done wrong in the case before him (*c*), where he threw the record out of court, and refused to hear the trial on account of its indecency, was, that it involved a civil injury to the Plaintiff, it being stated in the declaration that she had lost her marriage by reason of the slander.

HEATH, J. All games at dice except backgammon (*d*) are prohibited by law, and I think it would be vilifying and degrading courts of justice, if they were to hear, by means of a wager, a discussion on prohibited games.

LORD LOUGHBOROUGH. This was a mere idle wager, and I

(*a*) See 13 *Geo. 2. c. 19. s. 9*. But that distinction was not, nor could have been, the ground of the decision in *Pope v. St. Leger*, no exception having been made, at the time when that case was decided, in favour of the game of *backgammon*. It appears indeed from the various reports of that case, viz. Salk. 544. 4 *Mod.* 409. 5 *Mod.* 4. 1 *Lutw.* 484. that the wager was holden not to be within the *stat.* 16 *Car. 2. c. 7.* against gaming, and

therefore legal, because it was laid, not on the *chance*, but on the *rules* of the game, or as it is called, "the right of the play," which was a collateral matter.

(*b*) *Cowp.* 729.

(*c*) See an account of that case in *Da Costa v. Jones*.

(*d*) And games played with the back-gammon tables, 13 *Geo. 2. c. 19. s. 9*.

have

have no hesitation in saying, that I think a court or a jury ought not to be called upon to decide such wagers. But that point is not now insisted upon, nor is it necessary; for the other ground is extremely clear. I therefore adhere to the opinion which I held at the trial.

1792.

BROWN
against
LEESON.

Rule discharged.

GOODRIGHT, on the several Demises of BURTON, *against*
RIGBY and Others.

Wednesday,
June 20th.

IN this ejectment which was on two demises, one of lands, &c. in the parishes of *Lawford* and *Ardleigh*; the other of lands, &c. in the parish of *Lawford* in the county of *Essex*, tried before Mr. Baron *Hotham* at *Chelmsford*, at the Spring Assizes 1791, the following special verdict was found.

“ That *John Launder* and *Francis Plumtree*, being seised in their demesne as of fee of and in the lands, tenements and hereditaments, in the declaration mentioned, by a certain indenture, bearing date the 19th day of *December* 1738, made and executed between the said *John Launder* and *Francis Plumtree* of the first part, and the Right Honourable *Thomas Lord Onslow*, *George Bramston*, *William Guidott* and *John Barton*, of the second part, the said *John Launder* and *Francis Plumtree*, for and in consideration of the sum of 5s. to them paid by the said *Thomas Lord Onslow*, *George Bramston*, *William Guidott* and *John Barton*, did bargain and sell to the said *Thomas Lord Onslow*, *George Bramston*, *William Guidott* and *John Barton*, their executors, administrators and assigns, the premises, with the appurtenances in the declaration specified, to have and to hold the same, with the appurtenances, to the said *Thomas Lord Onslow*, *George Bramston*, *William Guidott* and *John Barton*, their executors, administrators and assigns, for one year from thence next ensuing, by virtue whereof, and by force of the statute for transferring uses into possession, the said *Thomas Lord*

By a marriage settlement, lands were limited to *A.* for life, remainder to *B.* for life, with intermediate remainders, remainder to the heirs of the body of *B.* *A.* became a bankrupt, and by an act of parliament passed to vest his estates in trustees for the payment of his debts, &c. the lands in question were given, after payment, &c. to *B.* for life, with such remainders over (in general terms of reference) as were limited by the settlement: under these

circumstances *B.* had a vested estate tail, of which she might suffer a recovery. A common recovery is good, though the sheriff return to the writ of seisin, that he delivered seisin on a day prior to the date of the conveyance to make the tenant to the *præcipe*, where the proceedings are all in the same term, by *stat. 14 Geo. 2. c. 20(a)*.

(a) [Affirmed on error in K. B. when the objection as to the estate tail of *B.* was abandoned. 5 T. R. 177. Af-

firmed on error from K. B. in the House of Lords. 2 Dow, 250.]

Onslow,

1792.

GOODRIGHT
against
RIGBY.

Recital of
the marriage
settlement
of *Richard
Williams*
and *Sarah
Bishop*.

Conveyance
to trustees

of the pre-
mises in the
first demise,

[48]
to the use of
*Mary Bur-
ton* for life ;

remainder
to *Sarah
Bishop* till
the mar-
riage ;

remainder
to *Richard
Williams* for
life ;
remainder
to trustees
to preserve,
&c. ;

remainder
to *Sarah
Bishop* for
life ;

remainder
to trustees
for 500
years ;

Onslow, George Bramston, William Guidott and John Barton, were possessed of the said premises, as the law requires, and being so possessed thereof, by a certain other indenture quadripartite of release, dated the 19th day of *December* 1738, and made between Sir *John Williams*, Knight, Dame *Mary* his wife, and *Richard Williams*, Esquire, of the first part, the said *John Launder* and the said *Francis Plumtree* of the second part, and *Henry Burton, Mary* his wife, and *Sarah Bishop*, of the third part, the said *Thomas Lord Onslow, George Bramston, William Guidott and John Barton*, of the fourth part, after reciting amongst other things, that a marriage was intended to be had and solemnized between the said *Richard Williams* and *Sarah Bishop*, the said *John Launder* and *Francis Plumtree*, for the consideration in the said indenture mentioned, did grant, bargain, sell, remise, release and confirm, unto the said *Thomas Lord Onslow, George Bramston, William Guidott and John Barton*, in their actual possession then being by virtue of the said bargain and sale, amongst other things, all the several tenements, with the appurtenances in the declaration mentioned, to hold the same to the said *Thomas Lord Onslow, George Bramston, William Guidott and John Barton*, their heirs and assigns for ever, to and for the following uses, intents and purposes, that is to say, as to all the several tenements, with the appurtenances in the first demise of the said declaration mentioned ; to the use of the said *Mary Burton* during her natural life, and from and after her decease, or the sooner determination of that estate, to the use of the said *Sarah Bishop* and her heirs, till the said intended marriage should take effect, and from and after the solemnization of the said intended marriage, and the determination of the estate of the said *Mary Burton*, to the use of the said *Richard Williams* during his natural life, without impeachment of waste, with remainder to the use of the said *Thomas Lord Onslow, George Bramston, William Guidott and John Barton*, during the life of the said *Richard Williams*, to preserve the contingent remainders, therein after limited, from being defeated or destroyed, with remainder to the use of the said *Sarah Bishop* during her natural life, without impeachment of waste, in full satisfaction of her dower, with remainder to the use of the said *Thomas Lord Onslow, George Bramston, William Guidott and John Barton*, for a term of 500 years, without impeachment of waste, upon certain trusts therein specified, which

which said term has long since extinguished, with remainder to the use of the first and other sons of the said *Richard Williams* on the body of the said *Sarah Bishop* lawfully to be begotten, successively in tail male, with remainder to the use of all and every the daughters of the said *Richard Williams* on the body of the said *Sarah Bishop* lawfully to be begotten, and to the heirs of the body and bodies of such several and respective daughters lawfully to be begotten, to take as tenants in common, and for want of such issue, *to the use of the heirs of the body of the said Sarah Bishop*, and for want of such issue, to the use of the said *Mary Burton*, her heirs and assigns for ever. And as to the several tenements, with the appurtenances, in the second demise of the said declaration mentioned, to the use of the said *Sarah Bishop* and her heirs until the said intended marriage should take effect, and from and after the solemnization of the said marriage, to the use of the said *Richard Williams* during his natural life without impeachment of waste, and from and after the determination of that estate, to the use of the said *Thomas Lord Onslow, George Bramston, William Guidott and John Barton*, during the life of the said *Richard Williams* to support the contingent remainders thereafter limited, from being defeated or destroyed, and from and after the determination of that estate, to the use of the said *Sarah Bishop* during her natural life, without impeachment of waste, with remainder after the decease of the said *Richard Williams* and *Sarah Bishop*, to the use of the first and other sons of the said *Richard Williams*, on the body of the said *Sarah Bishop* lawfully to be begotten, successively in tail male, with remainder to the use of all and every the daughters of the said *Richard Williams* on the body of the said *Sarah Bishop* to be begotten, and the heirs of their several and respective bodies, as tenants in common, and for want of such issue, *To the use of the heirs of the body of the said Sarah Bishop*, and for want of such issue, to the use of the said *Mary Burton*, her heirs and assigns for ever. And the jurors aforesaid, upon their oath aforesaid, further say, that *Henry Burton* and *Mary* his wife, in right of the said *Mary*, by virtue of the said two last indentures, entered into the tenements, with the appurtenances in the first demise of the said declaration mentioned, and became and were seised thereof in their demesne as of freehold, to wit, for and during the term of the natural life of the said *Mary*, the remainders thereof in form aforesaid belonging; and

1792.

GOODRIGHT
against
RIGBY.
remainder
to the first
and other
sons of *Richard Williams* and *Sarah Bishop*
in tail male;
remainder
to the daughters
in common,
in tail
general;
remainder
to the heirs
of the body
of *Sarah Bishop*;
remainder to
Mary Burton
in fee.
As to the
premises in
the second
demise,
to *Sarah Bishop*
till the marriage;
remainder to
Richard Williams
for life;
remainder to
trustees to
preserve, &c.
remainder to
[49]
Sarah Bishop
for life;
remainder to
the first and
other sons of
Richard Williams
and *Sarah Bishop*
in tail male;
remainder to
the daughters
as tenants
in common
in tail
general;
remainder to
the heirs of
the body of
Sarah Bishop;
remainder to
Mary Burton
in fee.
Entry of

1792.

GOODRIGH
against
RIGBY.
Henry Bur-
ton and
Mary his
wife, in her
right, into
the pre-
misses, in the
first demise.
Marriage
between Ri-
chard Wil-
liams and
Sarah Bi-
shop.
Entry of
Richard
Williams
into the pre-
misses, in
the second
demise.
Covenant
by Henry
Burton and
Mary his
wife, to levy
a fine of her
reversion in
fee,
to her use
for her life,
remainder to
the heirs of
her body.
Remainder
to Henry
Burton in
fee.

[50]

Fine levied
sur conu-
xance de
droit lan-
tum.

and that a marriage was afterwards had and solemnized by and between the said *Richard Williams* and *Sarah Bishop*, and thereupon the said *Richard Williams* entered into the tenements, with the appurtenances in the second demise of the said declaration mentioned, and became and was seised thereof as the law requires in his demesne as of freehold, to wit, for and during the term of his natural life, the remainders thereof in form aforesaid belonging. And the jurors aforesaid, upon their oath further say, that the said *Henry Burton* and *Mary* his wife, and *Richard Williams* being so respectively seised thereof, the said *Henry Burton* and *Mary* his wife, by a certain indenture, dated the 24th of *May* 1739, and made and executed between the said *Henry Burton* and *Mary* his wife, of the one part, and *John Launder* the younger, gentleman, of the other part, for divers good causes and valuable considerations, did covenant, promise and grant, to and with the said *John Launder* the younger, that they would before the end of the then *Easter Term*, or the then next *Trinity Term*, or some other subsequent term, acknowledge and levy to the said *John Launder* the younger, and his heirs, one or more fine or fines *sur conusance de droit tantum*, of all their reversions of the several tenements, with the appurtenances in the said indenture and declaration mentioned, which said fine or fines should be and enure to the use of the said *Mary Burton* during her natural life, with the remainder to the use of the heirs of the body of the said *Mary Burton*, by the said *Henry Burton*, or by any future husband lawfully begotten, and of the heirs of the body and bodies of such issue lawfully issuing, and for default of such issue, then to the use and behoof of the said *Henry Burton*, his heirs and assigns for ever. And the jurors aforesaid, on their oath aforesaid, further say, that in pursuance of the said indenture last mentioned, in the said *Easter Term*, in the said last-mentioned indenture specified, a fine with proclamations according to the form of the statute in that case made and provided, was had and levied in the court of his late majesty, of the bench at *Westminster*, before *John Willes*, *Alexander Denton*, *John Fortescue Aland*, and *William Fortescue*, the justices of our lord the king, of his common bench at *Westminster*, between the said *John Launder* the younger, Plaintiff, and the said *Henry Burton* and *Mary* his wife Defendants, amongst other things, of the said reversion of and in the

the several tenements and premises, with the appurtenances, comprized in the last-mentioned indenture, and specified in the within written declaration, whereupon the said *Henry* and *Mary* were summoned to answer the said *John Launder* the younger, in a plea of covenant in the said Court, that is to say, that the said *Henry* and *Mary* did acknowledge the same premises with the appurtenances, to be the right of him the said *John*, and they did grant for them and the heirs of the said *Mary*, that all the estate and interest which the said *Mary* then had in the aforesaid premises, with the appurtenances, should, after the decease of the said *Richard Williams* and *Sarah* his wife, and the longer liver of them and their sons without issue male of their bodies, and their daughters without issue of their bodies, wholly remain to the aforesaid *John Launder* and his heirs, to be held of the chief lords of the fee thereof, by the services which to the aforesaid premises with the appurtenances belong, for ever: And the aforesaid *Henry* and *Mary*, and the heirs of the said *Mary* would warrant to the aforesaid *John Launder* and his heirs, the said tenements and premises with the appurtenances therein mentioned, against them the said *Henry* and *Mary*, and the heirs of the said *Mary* for ever, and for that, &c. And the jurors aforesaid, on their oath aforesaid further say, that the said fine was afterwards duly proclaimed in the said term, and in the three terms then next following, according to the form of the statute in that behalf made: and that by virtue of the said indenture and fine, the said *Mary Burton* became and was seised of such estate, of and in the said reversion, as could or might lawfully pass to her, under and by virtue of the same indenture and fine, the further remainder thereof belonging to the said *Henry Burton* and his heirs. And the jurors aforesaid, on their oath aforesaid, further say, that the said *Richard Williams* afterwards became a bankrupt, and a commission was in due form of law issued against him, and *John Wood*, *Edward Mountney* and *Francis Salmon* were duly chosen assignees of his estate and effects, according to the form of the statute in such case made and provided, and all the real and personal estate of the said *Richard Williams*, was in due form of law assigned to them; and the jurors aforesaid, on their oath aforesaid further say, that before and at the time of the said bankruptcy and assignment, and of passing the act of parliament hereafter mentioned, said *Richard Williams*

1792.

 GOODRIGHT
 against
 RIGBY.

[51]

 Bankruptcy
 of *Richard*
Williams.

1792.

GOODRIGHT
against
RIGBY.

was seised in his demesne as of fee, of and in the reversion and inheritance of certain lands, tenements and hereditaments in the counties of *Essex* and *Suffolk*, expectant on the determination of certain particular estates, which were by the said indenture quadripartite of the 20th day of *December* 1738, limited to the use of the said *Richard Williams* for his life, without impeachment of waste, with remainder to trustees therein named, and their heirs, during the life of the said *Richard Williams* in trust, to preserve certain contingent remainders by the said indenture limited from being defeated and destroyed, and after the decease of the said *Richard Williams*, to the use of the said *Sarah Williams* for her life, in part of her jointure, and after the decease of the said *Sarah Williams*, to the use of the said *Thomas Lord Onslow*, *George Bramston*, *William Guiddott* and *John Barton*, their executors, administrators and assigns, for the term of six hundred years, and subject to the said term, to the use of the first and every other son of the said *Richard Williams*, on the body of the said *Sarah Williams* to be begotten, successively in tail male, and that the said lands and tenements last mentioned were the paternal estate of the said *Richard Williams*: And that afterwards, by a certain act of parliament made and passed in the twenty-first year of the reign of his late Majesty King *George* the Second, entitled,

“ An act for vesting the estates of *Richard Williams* a bankrupt, which were settled on his marriage with *Sarah Williams* his present wife, in the assignees under the commission of bankrupt awarded against him, to be sold for the payment of his debts, and for making a provision for the said *Sarah Williams* and her issue, in such manner as therein is mentioned,” reciting, among other things, the said indenture quadripartite, “ bearing date the 20th day of *December* 1738, and that the said *Richard Williams* had engaged in trade, and had met with great losses, and contracted debts to the amount of 15,000*l*; also reciting the said commission of bankrupt, and the said assignment of the real estate of the said *Richard Williams*, to the said *John Wood*, *Edward Mountney* and *Francis Salmon*, and that it had been proposed by and between the said *Richard Williams* and *Sarah Williams* on the one part, and the assignees under the said commission of bankrupt on the other part, that the fee-simple and inheritance in possession of the paternal estate of the said

“ *Richard*

Act recited,
for vesting
his estates
in the
assignees
under the
commission.

[52]

1792.

Geor. III.
against
Riary.

“ *Richard Williams*, should be absolutely vested in the said
 “ assignees, in order that the same, or a competent part there-
 “ of, might be sold, for raising money to discharge the said
 “ debts and incumbrances of the said *Richard Williams*, and
 “ that the surplus of the money arising by any such sale, after
 “ discharging of the said debts and incumbrances, should be
 “ laid out in the purchase of lands or hereditaments in fee-
 “ simple, and that such lands and hereditaments so to be pur-
 “ chased, together with such part of the said settled estates as
 “ should not be sold, should be settled and limited to the uses and
 “ for the purposes in the said act mentioned, and that a provision
 “ should be made out of the other estates comprized in the
 “ said indenture quadripartite, being the said premises in the
 “ said declaration mentioned, for the maintenance, benefit,
 “ and support of the said *Sarah Williams*, and of any child or
 “ children that she might happen to have by the said *Richard*
 “ *Williams*, in such manner as is therein mentioned, and that
 “ subject to such alterations, for the benefit of *Sarah Williams*,
 “ and the issue of the said marriage, in case there should be
 “ any, the same estate should remain and be confirmed to the uses,
 “ and for the purposes in the same settlement thereof limited and
 “ declared, it was enacted, that all and every the messuages,
 “ farms, lands, tenements, and hereditaments, being the pa-
 “ ternal estate of the said *Richard Williams*, which were so
 “ settled as aforesaid, should from and after the first day of
 “ *June* 1748, be settled upon and vested in, and the same were
 “ thereby settled upon and vested in the said *John Wood*, *Ed-*
 “ *ward Mountney* and *Francis Salmon*, their heirs and assigns,
 “ to the use of them their heirs and assigns for ever, freed and
 “ discharged, and absolutely acquitted, exempted, exonerated
 “ and indemnified, of from and against all and every the uses,
 “ estates, trusts, powers, previsoos and limitations, in and by
 “ the said therein recited settlements limited, created, provided
 “ and declared for the benefit of the creditors, and payment of
 “ the debts of the said *Richard Williams*, and other purposes
 “ as therein mentioned; And it was further enacted, that the
 “ said manor, messuages, lands, tenements and hereditaments,
 “ which in and by the therein and herein mentioned inden-
 “ ture quadripartite, were granted, conveyed, settled, and as-
 “ sured, to the several uses, and for the several purposes there-
 “ in mentioned, and not being the paternal estate of the said
 “ *Richard*

[53]

1792.
 GOODRIGHT
 against
 RIGBY.

“ *Richard Williams*, with their and every of their appurte-
 “ nances, should from and after the 1st day of *June* 1748, be
 “ settled upon and vested in *William Chapman* of *Battersea*, in
 “ the county of *Surry*, and *Robert Woodford* of *Lincoln’s Inn*,
 “ in the county of *Middlesex*, esquires, their executors, ad-
 “ ministrators and assigns, for and during, and unto the full
 “ end and term of one hundred years, if the said *Richard*
 “ *Williams* and *Sarah Williams*, or the survivor of them should
 “ so long live, the said term to take effect in possession, as to
 “ such parts or parcels of the manor and premises, as in and
 “ by the said indenture quadripartite, were limited in posses-
 “ sion to the said *Richard Williams* for life, and to take effect
 “ in possession after the death or other determination of the
 “ estate for life, of the said *Mary Burton*, in such parts or
 “ parcels of the said manor and premises, as by the said in-
 “ denture quadripartite were limited to her for life, upon the
 “ trusts, and to and for the ends, intents and purposes there-
 “ in declared, of and concerning the same, and which said
 “ term was determinable as in the said act is mentioned : and
 “ subject to the said term of one hundred years, it was thereby
 “ enacted and declared, that the said manor and other the pre-
 “ mises last mentioned, which in and by the said therein and
 “ herein recited indenture quadripartite, were limited to the
 “ said *Richard Williams* for his life, and to take effect in posses-
 “ sion, and in reversion after the death of the said *Mary Burton*
 “ respectively, and also all the estate and inheritance then vested
 “ in the said assignees, by virtue of and under the said com-
 “ mission of bankruptcy issued against the said *Richard Wil-*
 “ *liams* as aforesaid, of and in the same premises, should sub-
 “ ject to the said term of one hundred years, from and after the
 “ said first day of *June* 1748, be vested in *William Round*, of
 “ *Copthall-Court, London*, and *Gilbert Todrell*, of *Lincoln’s-Inn*,
 “ in the county of *Middlesex*, gentleman, and their heirs, during
 “ the life of the said *Richard Williams*, upon trust to pay, apply
 “ and dispose of the rents, issues and profits of the same premises,
 “ upon the same trusts, and to and for the same uses, intents,
 “ and purposes, as were thereafter enacted and declared of and
 “ concerning the rents and profits of the said manor and pre-
 “ mises, during the said term of one hundred years therein-
 “ before mentioned : and that from and after the determination
 “ of the said estate, and subject to the said term, the freehold
 “ and

“ and inheritance of all the said manor and premises during
 “ the life of the said *Richard Williams*, should be and remain
 “ to and in the trustees to preserve contingent remainders
 “ named in the said indenture quadripartite and their heirs,
 “ during the life of the said *Richard Williams*, and after the
 “ decease of the said *Richard Williams*, the same should be
 “ and remain to and in the said *Sarah Williams*, for the term of
 “ her natural life, without impeachment of waste, with such several
 “ remainders over, as are limited of the said last mentioned pre-
 “ mises, in the said indenture quadripartite, to take effect after
 “ her decease, in such order, course, and manner as the same were
 “ thereby limited and appointed of and concerning the same pre-
 “ mises; provided nevertheless, that nothing in that act con-
 “ tained should prejudice, impeach or defeat, any estate, use,
 “ trust, or interest, limited, created or declared, in or by the
 “ said recited settlement of the 20th day of *December* 1738,
 “ unto or for the benefit of the said *Mary Burton*, her heirs
 “ and assigns, and saving to the king’s most excellent majesty,
 “ his heirs and successors, and to all and every person and per-
 “ sons, bodies politic and corporate, his, her and their heirs,
 “ successors, executors, and administrators, (other than and
 “ except the said *Richard Williams*, and *Sarah Williams* his
 “ wife, and the first and other son and sons between them two
 “ begotten, or to be begotten, and the heirs male of the re-
 “ spective bodies of such sons, and the heirs male of the body
 “ of the said *Richard Williams*, and all and every the daughter
 “ and daughters of the said *Richard Williams*, on the body of
 “ the said *Sarah* begotten, or to be begotten, and the heirs of
 “ the body and bodies of such daughter and daughters, and
 “ the heirs of the body of the said *Sarah Williams*, and also
 “ the trustees named in the said recited settlements of the
 “ 20th day of *December* 1738, to preserve the contingent re-
 “ mainders, and to execute the trusts of the therein mentioned
 “ several terms of six hundred years and five hundred years,
 “ their respective heirs, executors, administrators and as-
 “ signs, and all and every other person and persons, claim-
 “ ing any use, trust, estate or interest, by virtue of and
 “ under the said recited settlement of the 20th day of
 “ *December* 1738, and not mentioned to be saved by that
 “ act,) all such estate, right, title, interest, claim and demands,
 “ of, in, to, and out of the same premises vested by the said

1792.

GOODRIGHT
against
RIGHT.

[55]

1792.

GOODRIGHT
against
RIGBY.

Henry Burton devised
his real es-
tates to his
brother *Michael Burton*.

Michael
seised ;

died.

Premises
descended to
the lessor
of the
Plaintiff.

Death of
Richard Williams
without
issue.

Death of
Mary Burton
without
issue.

“ act, or any part thereof, as they, every, or any of them had
“ before the passing of the said act, or would or might have
“ had or enjoyed in case the said act had not been made.”

And the jurors aforesaid on their oath aforesaid, further say,
that after the making of the said indenture of the 24th day of
May 1739, and after the levying the fine therein mentioned,
and after the making the said act of parliament, the said *Henry Burton* made his last will and testament in writing, dated the
17th day of *August* 1752, with a codicil thereunto annexed dated
the 18th day of *October* 1754, and which will and codicil were
duly executed and attested to pass lands, whereby the said
Henry Burton among other things devised all his messuages,
lands, tenements, hereditaments, and real estates whatsoever
and wheresoever after the decease of *Mary Burton* his wife,
unto his brother Doctor *Michael Burton* and his heirs : and the
jurors aforesaid, on their oath aforesaid further say, that the
said *Henry Burton* died in the year 1754 after making the said
will and codicil without issue, and without altering or revoking
his said will and codicil, and without having disposed of such
estate and interest of and in the said tenements, with the ap-
purtenances in the said declaration mentioned as had come to
him under the said indenture of the 24th day of *May* 1739, and
the said fine levied in pursuance of the said indenture ; by
virtue of which said devise *Michael Burton*, the devisee named
in the said will of the said *Henry Burton*, became and was
seised of such estate of and in the reversion of the said tene-
ments, with the appurtenances in the said declaration mentioned
as had belonged to the said *Henry Burton*, and being so seised
afterwards, to wit, in the year of our Lord 1759, died ; after
whose death, all the estate and interest of the said *Michael Burton*
of and in the said premises, descended and came to
Michael Burton, Esq. the lessor of the said *Cornelius*, (the Plain-
tiff) his son and heir ; and the said *Michael Burton* the lessor,
thereupon became seised of such estate of and in the said re-
version as could or might lawfully pass to him by virtue of the
several premises aforesaid. And the jurors aforesaid, on their
oath aforesaid, further say, that the said *Richard Williams* died
before the year of our Lord 1788, without having had issue by
the said *Sarah Williams* ; and that the said *Mary Burton* also
died on the 10th day of *July* in the year of our Lord 1778,
without having had issue by the said *Henry Burton* or any after-
taken

taken husband. And the jurors aforesaid, on their oath aforesaid, further say, that the aforesaid term of one hundred years ceased and determined immediately after the death of the said *Richard Williams*; and that the said *Sarah Williams* after the several deaths of the said *Richard Williams* and *Mary Burton*, entered upon the several tenements with the appurtenances in the said declaration mentioned, and became and was seised of such estate therein as could or might legally pass to her under and by virtue of the several premises aforesaid, and afterwards by a certain indenture bearing date and executed *on the 19th day of November in the year of our Lord 1778*, between the said *Sarah Williams* of the one part, and one *Robert Woodford* of the other part, she the said *Sarah Williams*, for and in consideration of the sum of five shillings to her in hand paid by the said *Robert Woodford*, did bargain and sell to the said *Robert Woodford*, his executors, administrators and assigns, the aforesaid several premises in the said indenture quadripartite contained, not being the paternal estate of the said *Richard Williams* being the premises in the said declaration mentioned, to have and to hold the same to the said *Robert Woodford*, his executors, administrators and assigns, for one whole year from thence next ensuing; by virtue whereof, and by force of the statute for transferring uses into possession, the said *Robert Woodford* became seised and was possessed of the said last mentioned premises as the law requires: and being so possessed thereof by an indenture tripartite of release, dated and executed *on the 20th day of November 1778*, and made between the said *Sarah Williams* of the first part, the said *Robert Woodford* of the second part, and *William Mayhew* of *Colchester*, in the county of *Essex*, Esq., of the third part; the said *Sarah Williams*, for barring and extinguishing all estates tail, and the remainders and reversions thereupon expectant and depending, and for settling, establishing, limiting, and disposing of the inheritance of the several premises in the said indenture mentioned to the several uses therein declared concerning the same, and for the considerations therein mentioned, did grant, bargain, sell, release and confirm unto the said *Robert Woodford* and his heirs in his actual possession then being, by virtue of the aforesaid bargain and sale thereof to him made by the said *Sarah Williams* for one year, all the said last mentioned tenements with the appurtenances, being the premises in the said declaration

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against
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Sarah Williams seised
for life.

Conveyance
by her to
Richard Woodford,
to make a
tenant to
the precept
in a recovery.

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against
RIGBY.

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To such
uses as Sa-
rah Wil-
liams should
appoint.

Recovery
suffered by
Sarah Wil-
liams.

declaration mentioned amongst other things, to have and to hold the same unto and to the use and behoof of the said *Robert Woodford* * and his heirs, to the intent and purpose that the said *Robert Woodford* might become a good and perfect tenant to the freehold of the said premises, in order that one or more common recovery or recoveries might be thereof had and suffered in the then present *Michaelmas* or *Hilary* term then next, or in any subsequent term; and it was thereby declared that the said recovery or recoveries should be and enure to the use of such person or persons, and of and for such estate and estates, intents, and purposes, and in such sort, manner and form as the said *Sarah Williams* by any deed or deeds in writing, to be by her from time to time duly executed and attested in the presence of two witnesses; or by her last will and testament in writing, or any writing purporting to be her last will to be by her duly executed, should at any time or times after the making of the said indenture, appoint, direct, limit, or declare, and for want of such appointment, and as to such part or parts thereof whereof no such appointment should be made, to the use of the said *Sarah Williams* her heirs and assigns for ever. And the jurors aforesaid, on their oath aforesaid, further say, that the said last mentioned indenture was duly inrolled in the Court of Chancery on the 8th day of *December* 1778, being first duly stamped according to the statute in such case made and provided, and that the said *Robert Woodford* by virtue thereof became and was seised of and in the said several lands and premises in the said last mentioned indenture, specified, as the law requires: and the jurors aforesaid, on their oath aforesaid, further say, that for the purposes which are expressed in the said indenture, one *William Mayhew* sued and prosecuted a certain writ of entry *sur disseisin en le post* out of his majesty's Court of Chancery at *Westminster*, directed to the sheriff of the county of *Essex* bearing date the 15th day of *October*, in the 18th year of his said majesty's reign, whereby his said majesty directed the said sheriff that he should command *Robert Woodford, Esq.* that justly and without delay he should render to the said *William Mayhew*, among other things, the several messuages, lands, tenements, and premises in the said declaration mentioned which he claimed to be his right and inheritance, and into which the same *Robert* had not entry, but after the disseisin which *Hugh Hunt* unjustly, and without

without judgment, had made to the aforesaid *William* within thirty years then last past, as he said, and whereof he complained that the aforesaid *Robert* deforced him, and unless he should so do, and if the said *William* should give security to prosecute his suit, that then he should summon by good summoners the said *Robert*, that he should be before the king's justices at *Westminster* on the Morrow of All Souls to shew why he would not do it: at which said day, before Sir *William de Grey*, knt., and his brethren, then justices of our lord the king, of the bench at *Westminster* aforesaid, came as well the said *William Mayhew* as the said *Robert Woodford*, in their proper persons, whereupon the said *William Mayhew* then and there demanded against the said *Robert Woodford* all the several tenements and premises with the appurtenances in the said writ of entry mentioned, as his right and inheritance, and into which the said *Robert* had not entry, but after the disseisin which *Hugh Hunt* thereof unjustly, and without judgment had made to the said *William* within thirty years, &c. and whereupon he the said *William* said that he was seised of the said tenements and premises with the appurtenances in his demesne as of fee, in time of peace, in the time of our lord the present king, by taking the profits thereof, to the value, &c. and into which, &c. and therefore he brought this suit, &c. and the said *Robert* in his own proper person came and defended his right, when &c. and thereupon vouched to warranty the said *Sarah Williams*, who was then and there present in court in her proper person, and freely warranted the said tenements and premises with the appurtenances in manner aforesaid, &c. and thereupon he said that he was seised of the said premises in his demesne as of fee, and in right, in the time of peace, in the time of the lord the present king, by taking the profits thereof, to the value, &c. into which, &c. and thereof he brought his suit, &c. and the said *Sarah* tenant by her own warranty came and defended her right, when, &c. and thereupon further vouched to warranty *Thomas Francis Martin*, who was likewise present there in court in his proper person, and freely warranted to her the said several tenements and premises with the appurtenances, and thereupon the said *William* demanded against the said *Thomas Francis* tenant by his own warranty, the several tenements and premises with their appurtenances in manner aforesaid, and thereupon he said that he was seised of the same pre-

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the writ of
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mises in his demesne as of fee and right in time of peace, in the time of the lord the present king, by taking the profits thereof to the value, &c. into which, &c. and thereof he brought his suit, &c. And the said *Thomas Francis* tenant by his own warranty, defended his right, when, &c. and said that the said *Hugh* did not disseise the said *William* of the said premises as the said *William* by his writ and declaration therein had supposed, and of that he put himself upon the country, &c. And the said *William* thereupon craved leave to imparle, and he had it, &c. And afterwards the said *William* came again there into court in the same term in his proper person, and the said *Thomas Francis*, although solemnly called, came not again, but departed in contempt of the court, and made default; therefore it was considered that the said *William* should recover his seisin against the said *Robert* of the same tenements and premises with the appurtenances, and that the said *Robert* should have of the lands of the said *Sarah* to the value, &c. and further that the said *Sarah* should have of the land of the said *Thomas Francis* to the value, &c. and that the said *Thomas Francis* should be in mercy, &c. and thereupon the said *William* prayed the king's writ to be directed to the sheriff of the county of *Essex*, to cause full seisin to be delivered to him of the same several tenements and premises with the appurtenances in the declaration within mentioned, and it was granted to him, &c. And thereupon a certain writ of our lord the king was issued out of the said court of our said lord the king of the bench at *Westminster*, bearing *teste* the 6th day of *November*, in the nineteenth year of the reign of our lord the now king, directed to the sheriff of *Essex*, whereby our said lord the king commanded the said sheriff that without delay he should cause the said *William* to have full seisin of the said several tenements with the appurtenances, and in what manner he should have executed that precept, he should make appear to our said lord the king's justices at *Westminster*, in *fifteen days of St. Martin*, and should have then there that writ, and which said writ was afterwards and before the return thereof delivered to *William Lushington*, Esq. then and there being sheriff of the said county of *Essex*, to be executed by him in due form of law. And the jurors aforesaid, on their oath aforesaid, further say, that in the said *fifteen days of St. Martin* the said *William Mayhew* came into the said court of our said lord the king of the

the bench at *Westminster* aforesaid, in his proper person, and the sheriff of the said county of *Essex*, namely, the said *William Lushington*, Esq. then returned, that he by virtue of the said writ to him directed on the 10th day of *November* in the same term did cause full seisin of the premises therein mentioned to be delivered to the said *William Mayhew* as by the said writ he was commanded. And the jurors aforesaid, on their oath aforesaid, further say, that the several messuages, lands and premises in the said recovery mentioned, are the same lands and premises as are mentioned in the indenture bearing date the 20th day of *November* 1778, and of which the premises in the said declaration are parcel, and that by virtue of the same last mentioned indenture and recovery the said *Sarah Williams* entered into the said tenements with the appurtenances in the said declaration mentioned, and became and was seised of such estate and interest therein as could lawfully pass to her under and by virtue of the same indenture and recovery, and being so seised, the said *Sarah Williams* by indenture of bargain and sale dated the 17th day of *June* 1779, between the said *Sarah Williams* of the one part, and *The Right Honourable Richard Rigby* of *Mistley Hall*, in the county of *Essex*, one of his Majesty's Most Honourable Privy Council, of the other part, in consideration of 10,545*l.* paid by the said *Richard Rigby* to the said *Sarah Williams*, she the said *Sarah Williams* did appoint, direct, limit, grant, bargain, sell, and confirm unto the said *Richard Rigby*, his heirs and assigns, all the tenements with the appurtenances in the said declaration mentioned, to have and to hold the same unto the said *Richard Rigby*, his heirs and assigns for ever, which said indenture was duly enrolled in the Court of Chancery, being first duly stamped according to the form of the statute in such case made and provided. And the jurors aforesaid, on their oath aforesaid, further say, that on the Morrow of the Holy *Trinity*, in the nineteenth year of the reign of our lord the now king, a fine *surconusance de droit come ceo, &c.* was duly levied in the Court of Common Pleas before the justices of the said court, between the said *Richard Rigby* Plaintiff, and the said *Sarah Williams* Defendant, of the several lands and tenements in the said declaration mentioned, whereby the said *Sarah Williams* did acknowledge all the said premises in the said declaration mentioned to be the right of him the said *Richard Rigby*, as those which the

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against
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the sheriff
tha the de-
livered sei-
sin on the
10th of No-
vember.

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said *Richard* had of the gift of the aforesaid *Sarah*, and those she did thereby remise and quit-claim from her and her heirs to the aforesaid *Richard Rigby* and his heirs for ever, and moreover that the said *Sarah* had granted for her and her heirs that they would warrant to the aforesaid *Richard* and his heirs, the aforesaid premises against her the said *Sarah* and her heirs for ever: And the said fine was afterwards duly proclaimed in the said term, and in the three next following terms in the said court, according to the form of the statute in that case made and provided, by virtue of which said last mentioned indenture and fine the said *Richard Rigby* entered into the said tenements with the appurtenances in the said declaration mentioned, and became and was seised of such estate and interest as therein could lawfully pass to him under and by virtue of the said indenture and fine. And the jurors aforesaid, on their oath aforesaid, further say, that the said *Sarah Williams* afterwards, to wit, on the 22d day of *September* 1782, died without issue, and that after her death and within five years next after the death of the said *Sarah Williams*, and within one year next before the commencement of this suit, to wit, on the 15th day of *September* 1787, the said *Michael Burton* the lessor of the said *Cornelius*, actually and in fact entered into and upon the tenements with the appurtenances in the said declaration mentioned claiming title thereto, and then and there claimed the same as his estate and freehold for the purpose of avoiding the said fine so levied by the said *Sarah Williams* as last aforesaid, and ejected the said *Richard Rigby* therefrom, and became and was seised thereof, and being so seised thereof, afterwards, to wit, on the 16th day of *September*, in the said declaration mentioned, demised the said several tenements with the appurtenances to the said *Cornelius*, to hold the same respectively to the said *Cornelius* and his assigns in manner and form as the said *Cornelius* hath in his said declaration within alleged, by virtue of which said several demises in the said declaration within mentioned, the said *Cornelius* afterwards, to wit, on the days respectively in that behalf in the said declaration mentioned, entered into the said tenements with the appurtenances, and was possessed thereof, and the said *Cornelius* being so possessed thereof, the said *Francis Hall*, *Ann Barnard*, and *Martha*, claiming title under the said *Richard Rigby*, afterwards, to wit, on the 18th day of *September*, in the said declaration mentioned, with

with force and arms entered into the several premises with the appurtenances so respectively demised to the said *Cornelius* as aforesaid, for the several terms as aforesaid, which were not then expired, and ejected the said *Cornelius* therefrom as the said *Cornelius* hath within thereof complained against them. But whether upon the whole, &c. &c. &c.

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On the part of the Plaintiff, *Bond*, Serjt., made two points of argument, 1. That *Sarah Williams* had not a sufficient estate tail vested in her, to enable her to suffer a recovery and bar the remainders over. 2. That supposing she had a sufficient estate for that purpose, yet the recovery in question was bad, because it appeared from the return of the sheriff, that he had executed the writ of seisin on the 10th of *November* 1778, but the tenant to the *præcipe* was not made till the 19th and 20th of *November* (a) in that year. As to the first point, he suggested that under the marriage settlement 1738, an estate for life was limited to *Sarah Williams* (then *Bishop*), and after other estates interposed, a remainder to the heirs of her body, but that by the act of Parliament which passed on the bankruptcy of *Richard Williams*, her estate for life was taken away, and a new one created, the limitation to the heirs of her body remaining unaltered; so that there were two estates created by two different instruments, which could not unite so as to give her a vested estate tail, and enabled her to suffer a recovery, and bar the remainder in fee, which was become vested in *Henry Burton*. But this objection the Court immediately over-ruled, and said there could be no doubt on the words of the act, that it operated merely to confirm the estate tail which *Sarah Williams* took by the marriage settlement: that the same objection had been made in the case of *Driver v. Hussey* (b), and the validity of it denied. In this *Bond* acquiesced, and applied himself to the second ground of argument, viz. that the recovery was void, on account of the time when seisin of the freehold was stated by the sheriff to have been delivered.

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On that ground, he argued, that it appeared on the record that seisin was given by the sheriff ten days before the date of the conveyance to the tenant of the freehold, when in fact *Sarah Williams* was in possession of the lands. This was repugnant,

(a) The date of the conveyance to *Robert Woodford*.

(b) *Ante*, vol. i. 269. As the principal point in that case, was of a dif-

ferent nature, and this objection but slightly mentioned, and not insisted upon, it was omitted in the report.

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and vitiated the whole proceeding. A recovery is not complete before execution; being a conveyance to uses, the nature of the estate is not altered, nor does there arise any new use to the recoverer, till the writ of seisin is properly executed. *Pigot on Recov.* 153, *Moore*, 141, *Sir W. Jones*, 10. Neither is this case within the *stat. 14 Geo. 2. c. 20. s. 5.* which arose from the fictitious relation to the first day of the term, and was made for a different purpose, *viz.* to prevent recoveries from being set aside, where the tenant to the *præcipe* is created by deed executed after the award of the writ of seisin. *Pigot*, 58. *Wilson on Fines*, 348. The words of the sixth section of the act are, “executed after the time of the judgment given, and the award of the writ of seisin.” But there is a material difference between the *award* and the *execution* of the writ, and the 7th and 8th sections expressly provide that the act shall not be extended beyond its strict limits.

The counsel on the other side were stopped by the Court, who said, that though there might have been some doubt, if it had been found as a fact, that seisin was actually given on the 10th of *November*, yet the day named in the return was immaterial; for it was not necessary to name any particular day, and the return would have been good without it. All that was necessary was, that seisin should be delivered after the judgment, and before the return of the writ, and that the proceedings should all be in the same term. That those requisites were complied with in the present case, which was directly within the statute *14 Geo. 2. s. 5 & 6.* As therefore the day mentioned in the sheriff’s return was repugnant to the rest of the proceedings, it was to be rejected, and there must be

Judgment for the Defendant.

Wednesday,
June 27th.

RONDEAU against WYATT.

A. and B.
enter into
a verbal
agreement

THIS was an action on the case, for the non-performance of a special agreement. The first count of the declaration for the sale of goods, to be delivered to A. at a future period: there is neither earnest paid, a note or memorandum in writing signed, nor any part of the goods delivered; this contract is void, being within the *statute of frauds* (a), though it is executory, and though it has been admitted by B. in his answer to a bill in Chancery filed by A.

(a) [The principle of this decision has been frequently recognized in subsequent cases; vide *Cooper v. Elston*, 7 T. R. 14. *Groves v. Buck*, 3 M. & S. 178. *Garbutt v. Watson*, 5 B. & A. 613.]

stated,

stated, that it was agreed between the Plaintiff and the Defendant, that the Plaintiff should buy of the Defendant 3000 sacks of flour of the Defendant and divers other persons carrying on trade in copartnership, by the name, style and firm of the *Albion Mill Company*, at the price of 4ls. *per sack*, but *upon condition*, and it was then and there understood between the said Plaintiff and Defendant, that the Plaintiff was to export the said flour to foreign parts; and it was then and there agreed &c. that the Defendant *should deliver*, or cause to be delivered to the Plaintiff, on board of ships or vessels in the river *Thames*, the said 3000 sacks of flour; that the Plaintiff requested the Defendant to deliver the said 3000 sacks of flour to the Plaintiff, on board certain ships in the said river, which the said Plaintiff had procured to receive the same according to the said promise, &c. Yet the Defendant not regarding, &c. did not deliver, &c. on board, &c. whereby the Plaintiff lost divers gains and profits, which he would have acquired by exporting and reselling the said 3000 sacks of flour, &c. &c. The other counts did not materially differ from the first. Plea, the general issue.

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At the trial, which came on before Lord *Loughborough*, at *Guildhall*, at the sittings after last *Michaelmas* term, it appeared that the Defendant, who was one of the proprietors of the *Albion Mill*, had entered into a verbal agreement to sell and deliver 3000 sacks of flour to the Plaintiff, to be put in sacks which the Plaintiff was to send to the Mill, and shipped on board vessels to be provided by him in the river, on an express condition that the flour should be exported to foreign parts, from some port which the Plaintiff was to open, and should not *meet the Defendant and the Company again in the home market*. In order to carry the scheme of exportation into effect, the Plaintiff sent down to *Shoreham* in *Sussex*, a large quantity of corn and flour merely to reduce, by collusion and a fictitious sale, the market price to the level prescribed by act of Parliament (a). But this intended trick being discovered by Government, the exportation was prevented, as the price was then very high, and an apprehension of a scarcity in this country prevailed. As the Plaintiff therefore could not legally comply with the condition contained in the contract, the Defendant refused to deliver the

(a) 13 Geo. 3. c. 45. s. 5.

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flour. In consequence of this, the Plaintiff filed a bill in Chancery (a) against the Defendant, praying a specific performance, a discovery of facts, &c. and the names of the partners in the undertaking. In his answers to the bill the Defendant admitted the agreement, but pleaded the statute of frauds, and averred that there was no note, or memorandum in writing, nor a delivery of any part of the flour to the Plaintiff, &c. following the words of the statute. That plea being over-ruled, the present action was brought, in which the Plaintiff obtained a verdict, contrary to the opinion of Lord *Loughborough*, before whom the cause was tried, who thought that on grounds of public policy, but chiefly because the contract seemed to him to be within the statute of frauds, the Plaintiff was not entitled to recover. And now a rule having been granted to shew cause why the verdict should not be set aside and a nonsuit entered, *Adair* and *Bond*, Serjts., shewed cause, contending that the contract did not come within the statute of frauds: first, because it was executory; secondly, because it was admitted by the answers in Chancery. 1. The agreement being to deliver the flour on board some ships in the river, it could not be performed till the time and place of delivery were fixed, it was therefore clearly executory, and being executory it was not within the statute according to a series of authorities. *Simon v. Metivier*, 5 Burr. 1921. 1 Black. 599. Bull. N. P. 280. *Towers v. Osborne*, Stra. 506. *Clayton v. Andrews*, 4 Burr. 2101. *Alexander v. Comber*, ante, vol. 1. 26. 2. As one great object of the statute was to prevent perjury in transactions of this kind, the case does not fall within it, where there is no danger of perjury by the agreement being admitted, and in the present instance the agreement was admitted by the answers in Chancery. This doctrine has been laid down both in law and equity, in the former by Lord *Mansfield*, 1 Black. 600, in the latter, 2 Atk. 155. 1 Vezey, 218. 221. Ambl. 586.

Lawrence and *Marshall*, Serjts., in support of the rule. Though by the terms of the agreement the flour was to be delivered on the river, yet it was not necessarily executory, for the delivery might have been immediate if the ships had been ready. But admitting that the delivery was to be at a future period, the contract was not, on that account, without the

(a) See 3 Brown. Cas. in Chan. 154.

statute, the words (a) of which are fully sufficient to comprehend it. There can be no good reason why the future delivery of goods should prevent the operation of the statute; on the contrary, there is much more danger of perjury being committed, and mistakes happening, where a verbal agreement is not to be executed till a distant period, than where it is to be completed as soon as it is entered into. With respect to the case of *Towers v. Osborne*, there was something in the contract besides the mere sale of goods, namely, the work and labour of making the chariot: but at best it is a loose note of a decision at *Nisi Prius*, and on that case the opinion of the Court in *Clayton v. Andrews* was founded, as also in *Alexander v. Comber*. As to *Simon v. Metivier*, the principle of that case was, that the auctioneer was the agent of both the buyer and seller. And when the present case came before Lord *Thurlow* in Chancery, his Lordship said, "I should have thought that the mere fact of the corn not being to be delivered immediately, would not have taken it out of the statute," and afterwards, "I do not go upon its being out of the statute; but if it is a measuring cast, and upon cases at law, which must stand till they are revised by a court of law, it is held to be out of the statute, I cannot, sitting in a court of equity say, that the cases are improperly settled at law." 3 *Brown, Cas. in Chan.* 155. It is plain therefore, that his lordship doubted the validity of those cases. As to the argument, that the contract was admitted by the Defendant in his answers in Chancery, the true rule seems to be, that if a party admits an agreement in his answer, without insisting upon the Statute of Frauds, the Court will hold it to be good. *Prec. in Chan.* 208. 374. 533. but where the statute is pleaded, and the exceptions of it negatived, the Court of Chancery will not compel the Defendant to execute it: *Whaley v. Bagenal*, 6 *Brown's Parl. Cas.* 45. *Whitchurch v. Bevis*, 2 *Brown's Cas. in Chan.* 556. Thus also the Court of Exchequer has holden, that if the Defendant by his answer insists upon the statute, a specific performance can-

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(a) 29 *Car. 2. c. 3. s. 17.* "No contract for the sale of any goods, wares and merchandizes, for the price of 10*l.* sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something

"in earnest to bind the bargain, or
"in part payment, or that some note
"or memorandum in writing of the
"said bargain be made and signed
"by the parties to be charged by
"such contract, or their agents there-
"unto lawfully authorized."

not

1792. not be decreed, though he confesses the agreement. *Stewart v. Careless*, in *Scacc.* April 10, 1785. *Eyres v. Iveson*, in *Scacc. Trin.* 1785. cited in *Whitchurch v. Bevis*, 2 *Brown's Cas. in Chan.* 563, 564. In the present case, the Defendant in his answer insists on the statute, and denies the exceptions contained in it.

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Cur. advis. vult.

On this day Lord *Loughborough*, after stating the facts of the case, pronounced the judgment of the Court (*a*), to the following effect.

[67] The only point to be decided is that which arises on the Statute of Frauds; and we who are now in Court think that the objection made on the statute is well grounded, and therefore that the Plaintiff ought to be nonsuited. It was said in the argument: 1. That the statute does not extend to cases of executory contracts; and 2dly, That it was not applicable, where the agreement, which was the subject of the action, stood confessed by the Defendant's answer to a bill in equity; and that in the present case the agreement did appear on the face of the proceedings in Chancery. To try the validity of the first objection, it will be necessary to advert to that clause (*b*) of the statute on which the question arises, and which directs that "No contract for the sale of any goods, wares and merchandizes, for the price of 10*l.* sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." Now it is singular that an idea could ever prevail that this section of the statute was only applicable to cases where the bargain was immediate, for it seems plain from the words made use of that it was meant to regulate executory as well as other contracts. The words are "No contract for the sale of any goods, &c." And, indeed, it seems that this provision of the statute would not be of much use, unless it were to extend to

(*a*) In which his Lordship, Mr. Justice *Gould*, and Mr. Justice *Heath*, were unanimous. But his Lordship mentioned, a few days before, that Mr. Justice *Wilson*, who was now

sitting in Chancery as one of the Lords Commissioners of the Great Seal, had declared himself to be of a different opinion.

(*b*) Sect. 17.

executory

executory contracts; for it is from bargains to be completed at a future period that the uncertainty and confusion will probably arise which the statute was designed to prevent. The case of *Simon v. Metivier*(a) was decided on the ground, that the auctioneer was the agent as well for the Defendant as the Plaintiff, and therefore that the contract was sufficiently reduced into writing. The case of *Towers v. Sir John Osborne*(b) was plainly out of the statute, not because it was an executory contract, as it has been said, but because it was for work and labour to be done, and materials and other necessary things to be found, which is different from a mere contract of sale, to which species of contract alone the statute is applicable(c). In *Clayton v. Andrews*(d), which was on an agreement to deliver corn at a future period, there was also some work to be performed, for it was necessary that the corn should be threshed before the delivery. This perhaps may seem to be a very nice distinction, but still the work to be performed in threshing, made, though in a small degree, a part of the contract. Some of the cases in the Court of Chancery seem to have been founded on the nature of the proceedings in equity, where the Court will lay hold of some circumstance of his own admission to compel a party to the performance of his agreement. But the same rule is not applicable to courts of law; for if a parol agreement were stated in a court of law, and there was a demurrer, which would admit the agreement, yet still advantage might be taken of the statute(e). The early cases in *Prec. in Chan.* 208.(f) and 374.(g) do

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(a) Bull. N. P. 280. 3 Burr. 1921.

(b) 1 Stra. 506.

(c) ["*Towers v. Osborne* is an extreme case, and ought not to be carried further." Per Abbott, C.J. *Garbutt v. Watson*, 5 B. & A. 614.]

(d) 4 Burr. 2101.

(e) [This must be understood of a demurrer to a plea in which the agreement is not stated to have been in writing, when it ought so to appear; in which case, as the demurrer only admits what is sufficiently pleaded, it does not admit the agreement. But if the agreement is stated in a declaration, where it need not appear to have been in writing, as it is then sufficiently pleaded, a demurrer will admit it. As to the rule that a demurrer does not admit matters in-

formally pleaded, see *Heard v. Baskerville*, Hob. 232, 233. 1 Freeman, 39. 199. *Steel v. Houghton*, ante, vol. 1. p. 62. *Duncan v. Thwaites*, 3 B. & C. 584. 1 Saund. 337 b. 5th edit. It may perhaps be doubted how far this rule is, in its terms, correct. It seems that a demurrer admits the facts stated, whether they be formally or informally pleaded, but that in the latter case, the party who has pleaded informally, cannot avail himself of any of the matters stated in his plea, and confessed by the other party, because he has neglected to state them in the form and manner prescribed by law. When once the plea is declared by the judgment of the Court to be bad for informality, it becomes no plea, and is wholly annihilated, so that

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do not seem fairly to admit any other construction than this, namely, that the Court thought that where a parol agreement was admitted by the Defendant's answer, he might or might not take advantage of the statute, at his option. I say the Court seem to have thought so, because in fact no such decree was made in those cases, which contain merely the extra-judicial opinions of the Lord Keeper and the Master of the Rolls. It is said in those cases, and has been adopted in the argument, that when the Defendant confesses the agreement, there is no danger of perjury, which was the only thing the statute intended to prevent. But this seems to be very bad reasoning, for the calling upon a party to answer a parol agreement certainly lays him under a great temptation to commit perjury. But though the preventing perjury was one, it was not the sole object of the statute: another object was to lay down a clear and positive rule to determine when the contract of sale should be complete. Accordingly, the statute has made it necessary that either the party buying should accept and receive part of the goods sold, or give something in earnest to bind the bargain, or that there should be some note or memorandum in writing signed by the parties to the contract. Something therefore direct and specific is to be done, to shew that the agreement is complete, that there may be no room for doubt and hesitation. This was the intention of the statute in all contracts of sale, above a certain value, in order to prevent confusion and uncertainty in the transactions of mankind; and we think it wise to adhere to that rule. It is not necessary, in a court of law, to inquire into the modes of proceeding by which courts of equity are guided,

that the admissions of the other party can avail nothing. But until it appears by the judgment of the Court, that the plea is informally pleaded, it must be taken that all the facts stated in it are admitted, though when that judgment is pronounced, the admission is destroyed together with the plea which it admits.

When a party demurs for matter of substance, he says, "I admit the facts to be true, but I say that though true, the party pleading them cannot take advantage of them, because they state no matter of law sufficient to support the pleading." When he demurs for matter of form, he says, "I admit the facts to be true, but I say,

that though true, the party pleading them cannot take advantage of them, because they are not pleaded in the formal manner required by law."

The proposition that a demurrer does not admit facts informally stated, though incorrect in point of expression, is true in effect. By the terms of that proposition it is conceded that the matters are informally pleaded, and consequently the pleading must be set aside by the Court; and when once set aside, the admission is gone also, and it is the same thing as if it had never been made.]

(f) *Croyston v. Baynes.*

(g) *Symondson v. Tweed.*

but

but it is observable that the case of *Whaley v. Bagenal* (a), in the House of Lords, coincides with the present determination of the Court.

Rule absolute to enter a nonsuit.

(a) 6 Brown's Cas. in Parl. 45. [8vo edit. vol. 1. p. 345.]

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GRANT *against* Sir CHARLES GOULD and Others.

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THIS case arose on a motion for a prohibition to prevent the execution of a sentence passed against the Plaintiff by a general court-martial holden at *Chatham* Barracks.

The motion was grounded on the following suggestion and affidavit:—

Easter Term, in the Thirty-second Year of the Reign of
King *George* the Third.

England } **B**E it remembered, That on the eighth day of *May*,
(to wit). } in this same term, comes here into the court of
our lord the king of the bench, *Samuel George Grant*, by *John Martin* his attorney, and gives the Court here to understand and be informed, that whereas by the statute called The Great Charter of the Liberties of *England*, it is declared and enacted, That no freeman may be taken or imprisoned, or be disseised of his freehold or liberties, or his free customs, or be outlawed, or exiled, or in any manner destroyed, but by the lawful judgment of his peers, or by the law of the land: and whereas, by the laws and customs of this realm, no person ought to be forejudged of life or limb, or subjected in time of peace to any kind of punishment within this realm by martial law who is not a soldier, and subjected to such law: and whereas, by the laws and customs of this realm, no evidence ought to be received or permitted to be read upon the trial of any person charged with any offence punishable by martial law, but such as is admissible according to the known rules of evidence prescribed and established by the common law of *England*: and whereas by the laws and customs of this realm no person ought to be convicted or punished by martial law of or for any offence not cognizable by the same; nor ought any person to be tried or

Saturday,
June 16th.
The receiving pay as a soldier subjects the receiver to military jurisdiction (a). This court therefore will not grant a prohibition to prevent the execution of the sentence of a court-martial passed against A., who has received pay as a soldier (but has assumed the military character merely for the purpose of recruiting, in the usual course of that service) though the proceedings of the court-martial appear to be in some instances erroneous.

(a) [Vide *Bradley v. Arthur*, 4 B. & C. 308.]

convicted

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Charge be-
fore the
court-mar-
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convicted by any court within this realm for any offence whatsoever, unless such person has been distinctly charged with such offence, and called upon to answer thereto previous to such trial, and unless such person has been permitted to make his defence to such charge, and to call and examine his witnesses in support of defence: nevertheless *William Wynyard*, Esq. well knowing the premises, but contriving and intending unjustly to aggrieve, oppress and injure the said *Samuel George Grant*, contrary to the said laws and customs of this realm heretofore, to wit, on the 21st day of *March* in the year of our Lord 1792, at *Chatham* in the county of *Kent*, did exhibit to and before a general court martial then and there convened and holden, a certain charge against the said *Samuel George Grant*, “for having
“ *advised and persuaded*(a) *Francis Heretage and Francis Stephen-
“ phenson, drummers in the Coldstream regiment of Foot Guards,
“ to desert his Majesty’s service, and to enlist into the service of
“ the East India Company, knowing them at the same time to be-
“ long to the said regiment of Foot Guards”*; and such proceedings were thereupon had, that afterwards, to wit, on the said 21st day of *March* in the year aforesaid, at *Chatham* aforesaid, the said *Samuel George Grant* was brought to a trial upon such charge by and before the said court-martial, and thereupon it became a material question, “Whether the said *Samuel George
“ Grant* was a soldier or not?” and upon that question the said court-martial then and there received and permitted to be read as substantive evidence against the said *Samuel George Grant*, certain letters written by Captain *Alexander Campbell* to Messrs. *Bishop* and *Brummell* or to certain other person or persons, and also a certain return or certificate of the said Captain *Alexander Campbell*, wherein the said *Alexander Campbell* returned or certified that the said *Samuel George Grant* had been enlisted as a soldier on the 25th day of *June* 1791; which said return or certificate the said court-martial then and there knew to have been made by the said Captain *Alexander Campbell* after the time of the said supposed offence was committed, and for the purpose of being produced as evidence against the said *Samuel George Grant*, although the said Captain *Alexander Campbell* was then alive and in full health, and residing in the county of *Cornwall*, and although it was then and there objected, that neither the said letter nor the said return or certi-

(a) [See stat. 37 G. 3. c. 70.]

ificate

ficate could or ought in anywise to affect or be used as evidence against the said *Samuel George Grant*; and although there was not then and there any legal evidence or colourable proof adduced against the said *Samuel George Grant*, to shew that he was or ever had been a soldier, yet the said *Samuel George Grant* then and there was ready and willing to have called divers witnesses, that is to say, one *Nathaniel Lindergreen*, one *Robert Abington*, Esq. and one *William Addington*, Esq. the said *William Wynyard*, one *Samuel Lunt*, and one *Joseph Turtle*, to prove that the said *Samuel George Grant* was not nor ever had been a soldier, and to satisfy the said Court that they had no jurisdiction to try the said *Samuel George Grant*; but the said Court then and there wholly refused to permit the said witnesses to be called, or to hear their testimony on behalf of the said *Samuel George Grant*, and such proceedings were thereupon had, that the said court being cleared, came to a determination that no more evidence was necessary to be produced for or against the circumstance of the said *Samuel George Grant* being in pay as a soldier in his Majesty's 74th regiment; and the Court having duly weighed and considered the evidence already produced, were of opinion that the said *Samuel George Grant* was and had been in pay as a soldier in his Majesty's 74th regiment since the 25th day of *June* last, and therefore considered themselves competent to proceed to the trial of the said *Samuel George Grant* for the charge exhibited against him, with which he had been arraigned, and to which he had pleaded Not Guilty; and the said court-martial, in order to support the said charge, then and there received and permitted and suffered to be read as evidence upon the said trial against the said *Samuel George Grant*, a certain certificate, purporting to be a certificate of a supposed conviction of the said *Samuel George Grant*, by and before *William Addington*, Esq. one of the justices of our lord the king, assigned to keep the peace of our said lord the king, in and for the county of *Middlesex*, for a supposed offence against a certain act of Parliament, made in the 31st year of his present majesty, intituled "An Act for Punishing Mutiny and Desertion, and for the better Payment of the Army and their Quarters", without calling for or requiring the production of the said supposed conviction, under the hand and seal of the said justice, and without calling for or requiring any other or better evidence of such supposed conviction than such certificate,

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certificate, although the said *William Addington* was then alive and in full health, and residing in the county of *Middlesex* aforesaid; and although the said *Samuel George Grant* then and there objected that the said certificate ought not to be received or read as evidence of the said supposed conviction; and that the said court-martial also then and there permitted and suffered to be read as evidence upon the said trial, a certain deposition in writing of the said *Francis Heretage*, then taken before the said *William Addington* as such justice as aforesaid, although the said *Francis Heretage* was then and there present at the said court-martial, and might have been there examined *vivâ voce*, touching the facts contained in the said deposition, and although the said *Samuel George Grant* then and there objected to the said deposition being read as evidence against him, and the said *Samuel George Grant* then and there called one *Samuel Lunt*, who was present at the said trial, and would have been a material witness in support of his defence against the said charge, and requested that the said *Samuel Lunt* might be sworn, and that the said *Samuel George Grant* might be permitted to examine the said *Samuel Lunt* as such witness; but the said court then and there arbitrarily and peremptorily refused to permit the said *Samuel Lunt* to be sworn, or to be examined as a witness for the said *Samuel George Grant*; and such further proceedings were thereupon had in and by the said court, that afterwards, to wit, on the 29th day of *March*, in the year aforesaid, at *Chatham* aforesaid, the said court having maturely considered the evidence given in support of the said charge against the said *Samuel George Grant*, with that produced in his defence, were of opinion that he, the said *Samuel George Grant*, “*was guilty of having promoted and having been*” “*instrumental towards the inlisting of Francis Heretage and*” “*Francis Stephenson into the service of the East India Com-*” “*pany, knowing them at the said time to belong to the said regi-*” “*ment of Foot Guards, and deeming this crime to be precisely of*” “*the same nature with that which is set forth in the charge, and*” “*to differ only in this, that it is rather inferior, but in a very*” “*slight degree in point of aggravation, they did adjudge him to*” “*be reduced from the rank and pay of a serjeant, and to serve as*” “*a private soldier in the ranks; and the said court did adjudge*” “*him to receive ONE THOUSAND LASHES on the bare back, with*” “*a cat-o’-nine tails, by the drummers of such corps or corp, at*”
such

“ *such time or times, and in such proportions, as his Majesty should think fit to appoint*”: whereas, in truth and in fact, the said *Samuel George Grant*, at the time of committing the said supposed offence was not, nor was he at the time of exhibiting the said charge aforesaid, a soldier, or subject to martial law : whereas, in truth and in fact, the evidence so received by the said court-martial against the said *Samuel George Grant* as aforesaid, was not admissible, nor ought the same to have been received by the said court according to the known rules of evidence, prescribed and established by the common law of *England* : and whereas, in truth and in fact, the supposed offence, whereof the said *Samuel George Grant* was so convicted as aforesaid, was not, nor is an offence cognizable by martial law : and whereas, in truth and in fact, the said *Samuel George Grant* was never, previous to the said trial and conviction, charged with or called upon to answer the said supposed offence, whereof he was so convicted as aforesaid : and whereas, in truth and in fact, the said court-martial ought to have permitted the said *Samuel George Grant* to call and examine his said witnesses, to prove that he the said *Samuel George Grant* was not, nor ever had been a soldier, and also in support of his defence against the said charge ; and the said *Samuel George Grant* gives the Court here further to understand and be informed, that *Sir Charles Gould*, Knt, his Majesty’s Judge Martial and Advocate General for the Army, contriving and intending as aforesaid, threatens to proceed upon and enforce the execution of the said sentence, to the great damage, terror and injury, of the said *Samuel George Grant*, and contrary to the laws and customs of this realm ; all which premises the said *Samuel George Grant* is ready to verify and prove as the Court here shall direct : wherefore the said *Samuel George Grant*, humbly imploring the aid and assistance of this court, here prays relief, and his majesty’s writ of prohibition to be directed to the said *Sir Charles Gould*, or to some other competent person or persons in that behalf, to prohibit him from proceeding upon or enforcing the execution of the said sentence, &c.

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AFFIDAVIT OF THE PLAINTIFF:

[74] *SAMUEL GEORGE GRANT*, formerly of *Charing-cross*, within the liberty of *Westminster*, in the county of *Middlesex*, victualler, but now a prisoner in his majesty's garrison at *Chatham*, in the county of *Kent*, maketh oath, and saith, that on or about the 25th day *December*, 1790, this deponent did enter into articles of agreement with one *James Rutherford*, of *Charing-cross*, aforesaid, victualler, reciting—That whereas the said *James Rutherford* was engaged on behalf of his majesty, and of the Honourable the Company of Merchants trading to the *East Indies*, to enlist men to serve in the respective land forces and marines; and this deponent further saith, that by the said articles it is witnessed that the said parties in consideration of the mutual confidence and fidelity they had and reposed in each other and for each other's benefit, and also in consideration of the sum of one hundred and five pounds to the said *James Rutherford* in hand paid by this deponent, the said *James Rutherford* and this deponent agree to become copartners in the enlisting and raising men to serve his majesty and the said Company of Merchants, and in the profits and advantages to arise therefrom; and this deponent further saith, that by the said articles of agreement it was agreed that the said copartnership business should be carried on and conducted at the house known by the name or sign of the King's Arms public-house, situate at *Charing-cross* aforesaid, or at such other premises and places as the said parties should, from time to time during their said copartnership, agree upon and appoint for that purpose at their mutual and equal expence and loss, and for their mutual and equal benefit and advantage; and this deponent further saith, that he was employed to raise recruits for different regiments, and particularly he was employed by Lieutenant *Grey* of the 76th regiment, on or about the 6th day of *April*, 1791. This deponent was also employed by Captain *Alexander Campbell* of the 74th regiment of foot, and this deponent did receive beating orders from the said Lieutenant *Grey* and Captain *Campbell* respectively, authorizing the deponent to raise men for the said 76th and 74th regiments: and this deponent further saith, that the terms on which this deponent did agree with the said Captain *Campbell* for such service, were, that this deponent should furnish at least 20 recruits for

for the said 74th regiment every year, for each of whom this deponent was to be paid the bounty money allowed by government; and this deponent further saith, that the said Captain *Campbell* further agreed with this deponent to allow him for such service a salary equal to the *pay and cloathing of a serjeant* of the said 74th regiment; and this deponent further saith, that he did assume *the character of a serjeant* of the said 74th regiment, and of the other regiments for which he was employed to recruit as aforesaid, in order to enable him to carry on the said business of a recruiting-agent, but that this deponent was *never actually enlisted* as a soldier in the said 74th regiment, or in any other regiment; and this deponent further saith, that he did receive money from Messieurs *Bishop* and *Brummell*, agents for the said 74th regiment, and for the said Captain *Campbell* on account of the said service; and this deponent did also apply to the said Messieurs *Bishop* and *Brummell* for the salary due by the said Captain *Campbell* to this deponent, and in the receipt or receipts granted by this deponent, he did acknowledge the money therein mentioned to be for his pay and subsistence; and this deponent believes that he did in such receipt or receipts annex to his subscription the words and figures following, to wit, “*Serjeant, 74th regiment*”, or words and figures to that effect; but this deponent says, that at the time he so received the money mentioned in the said receipt or receipts, and at the time he wrote the words annexed to his subscription to the said receipt or receipts, denoting this deponent to be a serjeant of the said 74th regiment as aforesaid, he did not consider himself to be *truly and really a serjeant* of the said 74th regiment of foot; and such words were added to his subscription merely that this deponent might appear to be a serjeant, in order to give effect to his enlistments; and this deponent further saith, that on or about the 26th day of *January* last two young men, named *Francis Heretage* and *Francis Stephenson*, were, as this deponent has been informed and believes, *inlisted in this deponent's house as soldiers for the service of the East India Company*; and it having been afterwards found that the said *Francis Heretage* and *Francis Stephenson* were deserters from the *Coldstream* regiment of Guards, they were delivered up to the said regiment; and this deponent further saith, that on or about the 3d day of *February* last, an information was exhibited against this deponent before

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taking and retainer, to undergo and receive all and singular such things as the said Chief Justice should then and there consider of concerning him in that behalf; and this deponent further saith, that the said writ was allowed by the said Lord *Kenyon* and delivered to the provost-marshal, as this deponent has been informed and believes, on or about the 6th day of *March* last, and on the 7th day of the said month of *March* last this deponent was carried before the said Lord *Kenyon*, at his house in *Lincoln's-Inn-Fields*; and this deponent further saith, that Messieurs *Joseph White* and *Thomas Lowten* attended to oppose the discharge of this deponent, and prayed farther time to prepare the return of the said writ, which was granted, and this deponent was remanded; and this deponent further saith, that he was again brought before the said Lord *Kenyon* on the 13th day of the same month of *March* last, at his Lordship's house in *Lincoln's-Inn-Fields* aforesaid, when the return was made to the said writ of *Habeas Corpus* by the said *William Hannam*, as such provost-marshal aforesaid, purporting that by certain articles of war, formed, made, and established by his majesty, in pursuance of, and according to the force of the statute in that case made and provided for the better government of his majesty's forces, it is ordained and established, "that whatever officer, non-commissioned officer, or "soldier shall be convicted of having advised or persuaded "any other officer or soldier to desert his said majesty's service, shall suffer such punishment as by the sentence of a "general court-martial shall be awarded;" and the said *William Hannam*, as such provost-marshal as aforesaid, did further certify and return, that, on the 17th day of *February*, in the 32d year of his Majesty's reign, *Samuel George Grant*, in the said writ of *Habeas Corpus* named, being then a non-commissioned officer and soldier in his Majesty's service, in the 74th regiment of foot, was taken by *Joseph Turtle*, a serjeant in his Majesty's *Coldstream* regiment of Foot Guards, and delivered into the custody of him the said *William Hannam*, being such provost-marshal as aforesaid, charged with having advised and persuaded *Francis Heretage* and *Francis Stephenson*, soldiers in the said *Coldstream* regiment, to desert his Majesty's service, and to enlist into the service of the *East India* Company, knowing them at the same time to belong to the said *Coldstream* regiment of Foot Guards; and he the said *William Hannam*, as

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such provost-marshal as aforesaid, did further certify, that the body of the said *Samuel George Grant*, having been so delivered to the care and custody of him the said *William Hannam*, being such provost-marshal as aforesaid, was then detained in his custody to answer the said charge, and also by virtue of an order from his Majesty's Secretary at War, bearing date the 18th day of *February* aforesaid, requiring him the said provost-marshal to detain in his custody the said *Samuel George Grant*, by the name of Serjeant *George Grant*, of the 74th regiment, it being intended to bring the said *Grant* to trial before a general court-martial, for having advised and persuaded two soldiers of the *Coldstream* regiment of Foot-Guards to desert his Majesty's service, and to enlist in the *East India Company's* service; and that this is the cause of taking and of detaining the said *Samuel George Grant*; and this deponent further saith, he was remanded by the said Lord *Kenyon*; and this deponent was taken to his Majesty's garrison at *Chatham* aforesaid, where he has been detained a prisoner ever since; and this deponent is now a prisoner in the said garrison as aforesaid; and this deponent further saith, that, on *Wednesday* the 25th day of *March* last, this deponent was brought to be tried before a general court-martial, held in the said garrison of *Chatham*, pursuant to his Majesty's royal warrant, charged with having advised and persuaded the said *Francis Heretage* and *Francis Stephenson*, drummers in the *Coldstream* regiment of Foot Guards, to desert his Majesty's service, and to enlist into the service of the *East India Company*, knowing them at the same time to belong to the said regiment of Foot Guards; and this deponent having been then asked by Major *Brownrigg*, the Deputy Judge Advocate of the said court-martial, if he acknowledged himself to be Serjeant *Samuel George Grant* of the 74th regiment, the deponent did answer to such question, that

[78] he was not Serjeant *Samuel George Grant* of the 74th regiment of foot: To which the said Major *Brownrigg* replied, that this deponent was Serjeant *Samuel George Grant*, of the 74th regiment of foot, and that he was then ready to prove it; and this deponent further saith, that he did then, as he does now, deny that he is, or that he ever was, a soldier, notwithstanding the court-martial did allow witnesses to be examined, in hopes of proving that this deponent was a soldier; and for that purpose the court-martial did admit as evidence certain letters written by

by the said Captain *Campbell*, to Messrs. *Bishop* and *Brummell*, or to some other person or persons, in which letters the said Captain *Campbell* mentions this deponent to be a serjeant; and also did admit as evidence a return or certificate of the said Captain *Campbell*, in which he certifies or returns that this deponent inlisted as a soldier on the 25th day of *June* 1791, which return or certificate was made up by the said Captain *Campbell*, and was received by the said Messrs. *Bishop* and *Brummell*, a few days only previous to this deponent's trial, and which return was, as the deponent believes, made up by the said Captain *Campbell*, for the purpose of being produced against him on the said trial; and this deponent saith, that in order to discredit the said letters and returns, this deponent did produce and prove two letters from the said Captain *Campbell* to this deponent, dated long after the said 25th day of *June*, to wit, the first dated the 13th day of *September* 1791, in which Captain *Campbell* writes to this deponent, that he had received this deponent's letter of the 17th, by which he was happy to see that this deponent had been so successful, and in which letter are the following passages: " You must be
 " approved of at *Chatham*, and leave your own attestation there.
 " I have, by last post, received a letter from the agent, in-
 " closing a charge of one pound fourteen shillings and six-
 " pence, made by you for pay to men deserted and rejected;
 " they very properly have refused paying it, as Government
 " will not admit it; and you know my agreement with you is,
 " that as I am to have no profit by the men you get, I am to
 " sustain no loss: if Government would allow the charge, you
 " should be welcome to it, but you cannot in reason expect me
 " to pay it out of my own pocket: if you look into the War-
 " Office letter to General *Townsend*, of the 4th of *October* 1788,
 " which I left with you, it will shew you that subsistence is
 " allowed only for such rejected or deserted men as have been
 " previously approved of by Field-officers appointed by General
 " *Townsend*." And this deponent further saith, that the other
 of the above-mentioned letters from the said Captain *Campbell*
 to this deponent, is dated the 14th day of *December* 1791, in
 which the said Captain *Campbell* writes to this deponent as
 follows: " You must know, as well as I can tell you, that I can-
 " not give you an order to receive either your bounty or pay,
 " till you are approved of, and your attestation lodged at *Chat-*
 " ham ;

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“ *ham* ; neither of which has, I believe, been done. I hope
 “ and trust that you have got some men for the 74th this month,
 “ although the *East India* Company’s offices are open : I was
 “ sorry to observe by your last return, that you had not inlisted
 “ a man for me since *October*.” And this deponent further
 saith, that the said Court did not allow this deponent to call
 his witnesses to prove that this deponent was not a soldier, but,
 on or about the 22d day of *March*, “ came to a determination
 “ that no more evidence was necessary to be produced for or
 “ against the circumstances of this deponent being in pay as a
 “ soldier in his majesty’s 74th regiment ; and the Court, having
 “ duly weighed and considered the evidence already produced,
 “ were of opinion that this deponent was and has been in pay
 “ as a soldier in his Majesty’s 74th regiment since the 25th
 “ day of *June* last, and therefore considered themselves com-
 “ petent to proceed to the trial of this deponent, Serjeant
 “ *Samuel George Grant*, of the 74th regiment of foot, aforesaid,
 “ for the charge exhibited against him, and for which he has
 “ been arraigned, and to which he has pleaded Not Guilty.”
 And this deponent further saith, that the said *Francis Heretage*
 was then called as a witness, and this deponent did re-
 quire the Deputy Judge Advocate, Major *Brownrigg*, to examine
 the said *Francis Heretage*, as to the nature and religious obliga-
 tion of an oath, and as to the penalties of perjury ; and this
 deponent did require the following question to be put to the
 said *Francis Heretage*, to wit, “ Do you know for what pur-
 “ pose an oath is now administered to you ?” And this de-
 ponent intended further to have put the following, among other
 questions, to the said *Francis Heretage*, to wit, “ Do you know
 “ the religious obligation of an oath ? Do you believe in a fu-
 “ ture state, after your death ? What do you expect will then
 “ become of you, if you should this day wilfully declare what
 “ is false to the Court ?” But the Court refused to allow the
 said first question to be put to the said *Francis Heretage*, and
 to examine him as to the nature and the religious obligation of
 an oath. And this deponent further saith, that previous to
 the examination of the said *Francis Heretage*, the prosecutor
 prayed that *William Davies*, a clerk in the public office in
 [80] *Bow Street*, might be called ; and he having produced and
 proved an information or deposition of the said *Francis Herc-*
tage and *Francis Stephenson*, taken before *William Addington*
 Esquire

Esquire, on or about the 3d day of *February* last, the prosecutor prayed that such information or deposition might be read over in the presence of the witness, *Francis Heretage*, against which this deponent objected; but the Court over-ruled the objection, and the said information or deposition was accordingly read over to the witness, *Francis Heretage*, and he then swore that the contents of the said information or deposition were true, which information or deposition verified, was admitted and read by the Court as evidence of the truth of the facts therein sworn. And this deponent further saith, that he did *require several questions* material to his defence, to be put to the said *Francis Heretage* and *Francis Stephenson*, and other witnesses on behalf of the prosecution, which question the Court refused to put to the witnesses; and this deponent further saith, that he was advised, and does believe, that *Samuel Thornhill*, then a prisoner in the *Savoy*, was a material witness for this deponent; and this deponent believes that an order was made by the Secretary at war, that the said *Samuel Thornhill* should be taken to *Chatham* to be examined as a witness for this deponent, on his said trial, but that the said *Samuel Thornhill*, though called on, was not produced, or was there any notice given to this deponent that the said *Samuel Thornhill* would not attend the said trial, or was any affidavit or other evidence produced, to prove to the Court that he could not through indisposition attend the said trial; and this deponent further saith, that Captain *Wynyard*, the prosecutor, having suggested that the said *Samuel Thornhill* could not attend on account of his bad state of health, but without offering any evidence of the fact to the Court, this deponent did pray that the Court would either allow the said *Samuel Thornhill* to be examined by deputation, or otherwise; but the Court refused to grant such his request; and this deponent further saith, that the said *William Addington* was also a material witness for the deponent, and, as this deponent has been informed, and believes, summoned by Sir *Charles Gould*, Knight, his Majesty's Judge Martial and Advocate General, to give evidence on the said trial on behalf of this deponent, and also to produce the record of the conviction of this deponent, dated on or about the 3d day of *February* last, with the informations and other proceedings on which the said conviction

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1792. conviction was made, but that the said *William Addington* did not attend pursuant to the said summons: and this deponent further saith, that in the course of the said trial Captain * *Wynyard*, the prosecutor, mentioned that the said *William Addington* had declared to him his readiness to attend, but that the prosecutor did on that occasion inform the said *William Addington* that his attendance would not be necessary; and this deponent saith, that he being desirous of having this proved and entered upon the proceedings, did, for that purpose, call the prosecutor to state the said conversation upon his oath, and to give his reason for desiring the said *William Addington* to disobey the said summons, but that the Court refused to allow the said Captain *Wynyard* to be sworn and examined by this deponent; and this deponent further saith, that he also called *Joseph Turtle*, a serjeant in the *Coldstream* regiment of Foot Guards, as a witness for him, but that the Court, after two or three introductory questions had been asked, refused to permit this deponent to proceed in the examination of the said *Joseph Turtle*, and he was accordingly dismissed by the Court, although this deponent says that the questions which he had previously put, and the questions which he intended to have put, were, as he was advised and believes, material and necessary; and this deponent further saith, that he also called *Samuel Lunt*, a serjeant-major in the said *Coldstream* regiment of Guards, as a witness for this deponent, and the said *Samuel Lunt* to attend the Court, to give his evidence accordingly, but the Court refused to admit the said *Samuel Lunt* to be sworn and examined by this deponent; and this deponent further saith, that on *Saturday*, the 24th day of *March* last, the prosecutor declared the evidence for the prosecution to be closed, and this deponent was advised that it would be necessary to detain one *Malone* as a witness, and he was accordingly dismissed on the said 24th day of *March*; and this deponent further saith, that he believes that the said *Malone* would have contradicted and discredited the testimony of *Stephen Betty*, a corporal, residing in the garrison of *Chatham*; and that the reason for dismissing the said *Malone* was, that the prosecutor had closed his evidence without having called the said *Betty* as a witness; and this deponent has been informed, and believes, that on the 24th day of *March* last, the said *Malone* left
Chatham

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Chatham and returned to *London*; and this deponent further saith, that on or about *Thursday* the 29th day of *March* last, this deponent did declare the evidence of his defence to be closed, when the prosecutor prayed to be again permitted to examine witnesses in support of his charge; to this the deponent objected, as being contrary to every judicial proceeding, to permit a prosecutor, after finding his case to be *totally overturned*, to begin the prosecution again, and examine other witnesses in support of his charge; but the Court permitted the prosecutor to examine witnesses, not only in respect of any new matters arising out of this deponent's defence, but in support of his charge; and the said Captain *Wynyard*, the prosecutor, and *Stephen Betty*, were examined accordingly; and this deponent further saith, that he then prayed the Court to adjourn, that he might send an express to *London* to bring back *Malone*, that he might be examined to contradict the testimony of the said *Stephen Betty*, and the prosecutor objected to this; and this deponent's request was disallowed by the Court; and this deponent further saith, that in order to prove the conviction of this deponent before the said *William Addington*, as aforesaid, the said Captain *Wynyard*, the prosecutor, produced a certificate of such conviction, under the hand of the said *William Addington*, he, the said *William Addington*, being then living, and dwelling and residing, as this deponent has been informed and believes, within the county of *Middlesex*; and this deponent did object against such certificate, that it was not evidence of the conviction, and that the record of the conviction itself must be produced; but this deponent saith, that the said court-martial did admit such certificate as evidence of the said conviction, upon the evidence of Captain *Wynyard* alone; that he saw the said *William Addington* sign the said certificate, although the said Captain *Wynyard*, at the same time, admitted that he did not even examine the said certificate with the record of the said conviction; and he would not swear that the said record was duly certified; and this deponent further saith, that he has been informed and believes, that after the conclusion of the said trial, a sentence has been drawn up by the said court-martial, as follows: to wit, "The
 " Court having maturely considered the evidence given in
 " support of the charge against the prisoner, Serjeant *Samuel*
 " *George*

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[83] “ *George Grant*, with that produced in his defence, are of
 “ opinion, that he, the said Serjeant *Samuel George Grant*, is
 “ guilty of having promoted, and having been instrumental
 “ towards the inlisting of *Francis Heretage* and *Francis*
 “ *Stephenson* into the service of the *East India Company*,
 “ knowing them at the same time to belong to the said regi-
 “ ment of Foot Guards; and deeming this crime to be pre-
 “ cisely of the same nature with that which is set forth in the
 “ charge, and to differ only in this, that it is rather inferior,
 “ but in a very slight degree, in point of aggravation, they do
 “ adjudge him to be reduced from the rank and pay of a
 “ serjeant, and to serve as a private soldier in the ranks; and
 “ the Court do further adjudge him to receive one thousand
 “ lashes on the bare back, with a cat-o’-nine tails, by the
 “ drummers of such corp or corps, at such time or times, and
 “ in such proportions as his Majesty shall think fit to appoint.”
 And this deponent further saith, that he has been informed,
 and believes, that the proceedings of the said court-martial
 having been transmitted to the said *Sir Charles Gould*, they
 were afterwards returned to the said court-martial, to be by
 them revised; and that the same have been so revised, and
 have been returned to the said *Sir Charles Gould*; and the
 said sentence has been confirmed by his Majesty; and this de-
 ponent further saith, that he has directed actions to be brought
 in this Honourable Court (a), against his Royal Highness
Frederick Duke of York, *Matthew Lewis*, Esq. *William Han-*
nam, *Samuel Lunt*, and *Joseph Turtle*, and this deponent has
 been informed, and believes, that such actions are brought
 accordingly, to obtain redress for his said illegal and unconsti-
 tutional caption, imprisonment, and trial; and this deponent
 has also caused to be presented his humble petition to his
 Majesty, praying that his Majesty would be graciously pleased
 to arrest the execution of the sentence of the said court-martial
 against this deponent, that this deponent might not be sent out
 of his native land, or be subjected to any military punishment,
 until a jury of his country shall have cut him off from civil so-
 ciety, and shall have determined whether he is or is not ame-
 nable to martial-law; and this deponent further saith, that the

(a) [That an action will lie by an
 inferior officer against his superior,
 who wrongfully imprisons him under

colour of military authority, see
Warden v. Bailey, 4 Taunt. 67. 4 M.
 & S. 400. S. C. in error.]

said

said sentence of the said court-martial hath not yet been executed against this deponent.

SAMUEL GEORGE GRANT.

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Sworn at his Majesty's
garrison, at *Chatham*,
aforesaid, the 1st day
of *May*, in the year
of our Lord, 1792,
before me,

JOHN GIBBS,
A Commissioner, &c.

Marshall, Serjt., in support of the motion for a prohibition, argued in the following manner. He began by observing that martial-law, being dangerous to public liberty, ought to be strictly confined within its proper limits. The establishment of a standing army in *England*, and of its necessary concomitant, martial-law, in time of peace, is an innovation on the true principles of the *British* government. At common law, "If a lieutenant, or other, hath commission of martial authority, in time of peace, and hang or otherwise execute any man by colour of martial-law, this is murder; for it is against *Magna Charta*, cap. 29. and is done by such power and strength as the party cannot defend himself, and here the law implieth malice." 3 *Inst.* 52.

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"Martial-law is built on no settled principles, but is entirely arbitrary in its decisions, and is in truth no law, but something indulged rather than allowed as law, a temporary excrescence bred out of the distemper of the state, and not any part of the permanent and perpetual laws of the kingdom. The necessity of order and discipline is the only thing which can give it countenance, and therefore it ought not to be permitted in times of peace, when the king's courts are open for all persons to receive justice, according to the law of the land." 1 *Black. Com.* 413. *Hale*, *Hist. C. L.* 34 (a).

These are principles which cannot be controverted, and which have been established ever since the time of *Ed. 2.* *Hale*, *Hist. C. L.* 35.

But though they have been always indisputable, they have been in former times violated by the kings of *England*, who

(a) Last edit.

frequently

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frequently enforced obedience to their arbitrary will by the assistance of military tribunals erected without any legal authority.

In the reign of *Philip and Mary*, a *proclamation* was issued declaring that whoever was possessed of heretical books, and did not presently burn them without reading them, or shewing them to others, should be deemed a *rebel*, and executed immediately by martial law. And in the succeeding reign of *Elizabeth*, the exercise of martial-law was no less an object of complaint, for in cases of insurrection it was not only exercised on military men, but on the people in general, and was extended even to those who brought *papal bulls, &c. from Rome*: any person might be punished *as a rebel*, or as an aider or abetter of rebellion, whom the provost-marshal or lieutenant of a county pleased to suspect. *Hume, Hist. Engl. vol. iv. p. 419, vol. v. 454.*

[85] Lord *Bacon* says, that the trials at common law granted to the *Earl of Essex* and his fellow conspirators, were deemed a favour, for that the case would have borne and required the severity of martial-law. But the most extraordinary act of her reign was her “commission to Sir *Thomas Wilford* as provost-marshal granting him authority, and commanding him upon
 “signification from the justices of peace of *London* or the
 “neighbouring counties, of idle vagabonds and riotous persons, *worthy to be speedily executed by martial-law*, to take
 “them, and according to the justice of martial-law, to execute
 “them on the gallows or gibbet near the place where they
 “committed their offences.” *Ibid. 456.*

One of the principal causes of the discontents in the beginning of the reign of *Charles I.*, was the granting commissions under the Great Seal to proceed by martial law, under pretext of which some persons were put to death, who, if guilty of any offence, ought to have been tried by the common law. These commissions were by the *petition of right* annulled and declared to be illegal.

From that time the people of *England* have always entertained a great jealousy of *standing armies*, and particularly of *martial law*, which in every principle is so much at variance with the mild administration of justice by the common law.

That jealousy cannot be better expressed than in the preamble to the annual mutiny act, which recites that “Whereas
 “the

“ the raising or keeping a standing army within this kingdom
 “ in time of peace, unless it be with the consent of Parliament,
 “ is against law; and whereas it is adjudged necessary by his
 “ Majesty and his present Parliament, that a body of forces
 “ should be continued for the safety of the kingdom, the de-
 “ fence of the possessions of the crown of *Great Britain*, and
 “ the preservation of the *balance of power of Europe*”: (and
 after reciting the number of troops to be kept on foot, it pro-
 ceeds) “ And whereas no man can be forejudged of life or
 “ limb, or subjected in time of peace to any kind of punishment
 “ within this realm, by martial law, or in any other manner
 “ than by the judgment of his peers, and according to the
 “ known and established laws of this realm.”

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Mr. Justice *Blackstone*, who was never accused of any dispo-
 sition to loose the bands of society, or to weaken the necessary
 powers of government, expresses himself to the same effect on
 the subject of standing armies and martial law. Vide 1 *Bl. Com.*
 414, 415, 416, &c.

Such being the nature of martial law, and such being the
 natural apprehensions which the least extension of it must ever
 excite in the minds of a free people, it is needless to dwell on
 the necessity of confining this vast and formidable power ri-
 gidly within the limits prescribed to it. The power of confining
 it within those limits, is happily lodged by the constitution in
 the Supreme Courts of *Westminster*, the sure refuge to which
 alone every oppressed subject can or ought to fly for protection
 from military despotism.

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If the Courts of *Westminster* will restrain an inferior court
 from proceeding in a cause, of which it has original jurisdiction,
 merely because a matter incidentally occurs, which is properly
 triable by the common law, with what watchful solicitude will
 they observe the conduct of a *court-martial*, deciding on the
 important question, *whether soldier or not?* a question which in-
 volves in it the dearest birth-right of every *Englishman*, the
trial by jury!

There are four grounds, upon each of which it is submitted
 that the Court ought to grant a prohibition:—

First, That the Plaintiff *Grant* was not a soldier, and there-
 fore not liable to be tried by martial law.

Secondly, That evidence was received against him contrary
 to

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to the rules of the common law; and evidence for him, which was admissible, was rejected.

Thirdly, Supposing him to have been a soldier, yet he ought not to have been convicted of any offence with which he was not specifically charged previous to his trial.

Fourthly, The offence of which the Plaintiff was convicted is not an offence cognizable by martial law.

1. The Plaintiff was not a soldier, and therefore not liable to be tried by martial law.

If there be a case in which above all others it becomes the Courts of *Westminster* to be peculiarly watchful over the right of the subject, it is in the case of a court-martial deciding on the extent of its own jurisdiction. It is not disputed that a court-martial has power to try the question, whether soldier or not? That power must be inseparable from their jurisdiction. But they exercise it at their peril; and it behoves them to have the most explicit and unequivocal proof that a man is a soldier, before they venture to put him on his trial for any offence whatever. If it shall be in the power of any military commander to take up a man under pretence of some supposed military offence, and it shall be in the power of a court-martial to give themselves jurisdiction over him, by deciding him to be a soldier, upon evidence such as has been received in the present instance, the liberty of the subject is at an end, and the army may, as soon as its commanders shall think fit, become the sovereign power of this country. That in fact the Plaintiff was not a soldier, appears from the proceedings before the court-martial(a).

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2. Evidence was received against the Plaintiff which was not admissible by the rules of the common law, and evidence for him rejected which ought to have been received. Every court which assumes the name of a court of justice, must have some principles or rules for its guidance in the investigation of truth. The rules of evidence of the common law, at least so far as they are applicable to criminal proceedings, are neither numerous nor complex, but plain and simple, and are founded in wisdom and established by the experience of ages. The rules of evidence are perhaps those, of all others, which ought to be kept inviolate with the most religious veneration. The whole admi-

(a) Vide the suggestion and affidavit.

nistration

nistration of justice, both civil and criminal, in a great measure depends on them.

A court-martial is the mere creature of the annual mutiny act, and has not the smallest shadow of authority but what it derives from that act; it is impossible that it can have any ancient or immemorial rules of evidence peculiar to itself. Now it may be laid down as a clear and indisputable principle of law, that wherever an act of Parliament erects a new judicature, without prescribing any particular rules of evidence to it, the common law will supply its own rules, from which it will not suffer such new-erected court to depart. This would hold even in matters merely civil, and surely much more strongly in questions of a criminal nature.

This is not mere theory, but the law of the land; and the general practice of courts martial is conformable to it.

This appears by every treatise that has been published on the subject of either naval or military courts martial. *Ayde on Courts Martial*, 174. *Sullivan's Thoughts on Martial Law*, 45. 55. *Military Arrangements*, 121. *Mac Arthur's Treatise on Naval Courts Martial*, 107. 112. and *Frye's Case*, *Append.* No. 13. p. 62.

1. Improper evidence was received. The return of subsistence from the 25th of *June* to the 24th of *December* was not authenticated, nor was it said by whom or to whom it was made. All the letters from Captain *Campbell*, and his return dated 16th of *March* 1792, may be false. There is ground for suspicion, inasmuch as he had never, till just before the trial, made any return to his agent, though by *stat.* 23 *Geo.* 3. *c.* 50. *s.* 34. he was bound to make a return every two months. But Captain *Campbell* himself ought to have been called, he alone could give the best evidence which the nature of the thing admitted of, to prove the Plaintiff a soldier; the not calling him affords a presumption that some falsehood was concealed, which he could have detected. The muster return was not authenticated, and is liable to the same suspicion. Captain *Williamson* who produced it did not swear when it was received at *Chatham*, but believed in *January* last; conceiving that Captain *Campbell* would not make a false return, he thought the return a sufficient proof of the Plaintiff being a soldier. This hypothetical mode of swearing is decisive to shew the necessity of authenticating the return. Captain *Hewgill's* account of the opinion of Lord *Ken-*

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yon, that the Plaintiff might be proceeded against as a soldier, was not evidence, it was merely an *extra-judicial dictum* dropped in conversation. The written examination of *Francis Heretage* was received, but he was not asked, whether *it was true*, but only whether it was the deposition sworn to by him. The next day indeed, when it was offered to be read as *Stephenson's* evidence, the objection prevailed.

2. Proper evidence was rejected, *viz.* that of *Turtle* and *Lunt(a)*.

Now for receiving improper evidence, even after sentence, a prohibition will lie. Thus in *Bredon v. Gill*, 2 *Salk.* 555. 5 *Mod.* 271. 1 *Ld. Raym.* 212. On an appeal from the commissioners of excise to the commissioners of appeals, under the 12 *Car. 2. c. 23.* the commissioners of appeals received as evidence the depositions of witnesses written down by the clerk of the commissioners of excise, without examining the witnesses themselves *viva voce*. A prohibition was moved for after sentence, which was at first refused, because this had been the course ever since the passing the statute. But the Court, having changed their opinion, held that the witnesses ought to have been examined *de novo*; that this was the intent of the act, and was just, because the depositions might *misrepresent*, or not represent the *whole case*, and it was compared to appeals upon orders of justices, where the examinations are always *de novo*.

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Upon a declaration in prohibition it appeared that the Plaintiff, who had been libelled against in the spiritual court for a legacy, pleaded payment, and offered to prove it by a single witness, which the Court refused, though the witness was unexceptionable, and thereupon sentence was given against the Plaintiff in prohibition, which sentence was now pleaded, and upon demurrer to the plea, the Court after much argument held that the prohibition should be granted; and they said a prohibition might be granted as well after sentence as before. *Shotter v. Friend*, 3 *Mod.* 283. 2 *Salk.* 547. 1 *Show.* 158. 172. It is true that a prohibition does not lie after sentence, unless the want of jurisdiction appear on the face of the proceedings according to the doctrine of *Blacquiere v. Hawkins*, *Dougl.* 377. But where the objection is not the want of jurisdiction but

(a) These and the other circumstances respecting the evidence, appeared on the minutes of the court-

martial, which were laid before this court. Vide also the suggestion and affidavit.

some

some irregularity or abuse of jurisdiction, it is not to be expected that it should appear on the face of the proceedings: nor is it necessary that it should, to entitle the party to a prohibition. *Adriel Mill's case*, *Skin.* 299.; for if after sentence a collateral matter not appearing on the face of the proceedings be the ground of the application, it is sufficient if the suggestion be supported by affidavit. *Buggin v. Bennet*, 4 *Burr.* 2037. *per Lord Mansfield, Yates, and Aston, J.*

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Thus it appears that the supreme courts have power not only to confine all other courts within their proper jurisdiction, but also to control and correct their irregular proceedings, and compel them to conform to the proper rules of evidence.

3. Supposing the Plaintiff to have been properly found to be a soldier; yet he ought not to have been convicted of an offence, with which he was not specifically charged previous to his trial.

It is a principle of natural justice, and therefore it is a rule of the law of *England*, that no man shall be put upon his trial for any offence before any court of judicature, unless previous to such trial he has been distinctly and specifically charged with such offence, and called upon to answer it; for it is impossible for any man to come prepared to defend himself against a charge of which he is ignorant. This rule was early recognized, and solemnly established by several judgments in parliament. The want of a previous charge was the principal error upon which the judgment against the *Mortimers* in the time of *Ed. 2.* was reversed in parliament in the 1st *Ed. 3.* 2 *Hale, P. C.* 217.

So the like was done in the case of the earl of *Lancaster* in 1 *Ed. 3.* 1 *Hale, P. C.* 314. [90]

And in *Hale* there are many instances and authorities to prove, that no man can be convicted or attainted of any crime without arraignment and being put to answer it. 1 *Hale, P. C.* 346.

It is upon the plea of Not Guilty alone that the party accused can be put upon his trial, nor can he (except in the case of a confession or standing mute, which is equivalent) receive sentence, but upon that plea. Here the Plaintiff never pleaded to a charge that was not made. The charge is, the having *advised and persuaded Heretage and Stephenson to desert*, and to enlist in the *India Company's service*. The first part of this charge

1792. charge is within one of the Articles of War, *sect. 6. art. 5. p. 24.*, the rest is merely aggravation, and not being within any of the articles of war, should not have been inserted in the charge.

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The nature of this offence is that of an *accessary before the fact*; for it goes on the idea that the men *had not yet deserted*. The conviction is having *promoted, and having been instrumental towards the inlisting of Heretage and Stephenson into the service of the India Company, knowing them to belong to the Coldstream regiment of Foot Guards*.

This conviction is founded on a supposed prior desertion; and indeed it is so apparent that the men had deserted before they came to the Plaintiff to be inlisted, that the court-martial could not proceed upon any other idea. Consequently the offence found is, promoting and being instrumental in the inlisting of men, for the *India Company, who had already deserted*. This, therefore, taking it to be an offence at all, is that of an *accessary after the fact*.

[91] The desertion of the men was already complete, and *being instrumental to their being inlisted with the India Company, was perfectly different* from the offence of *persuading them to desert*. Persuading to desert is the *substance* of the offence, inlisting is only a *circumstance*. It is true, that a man charged with a capital crime may be convicted of an offence of an *inferior degree*, but then it must be of the *same nature* with the offence charged. But the offence found on this sentence, is not of the same nature. The charge contains an offence prohibited by the articles of war: it also contains a circumstance which is there added by way of aggravation, but which (as will be proved hereafter) is no offence either by the articles of war, or by the mutiny act. Now the offence found is only this matter of aggravation, which is subjoined to the charge, and not the charge itself, or any inferior species or degrees of it: and even that is found different from the charge. The charge in that respect is, *advising and persuading to inlist into the service of the India Company*.

The offence found is, *promoting and being instrumental towards the inlisting*.

Suppose a person indicted as an accessory before the fact in feloniously *advising and persuading J. S. to steal my goods*, and the jury find that at such a time and place *J. S. stole my goods*,
and

and that the Defendant received the same goods knowing them to have been stolen; this verdict would be void as finding a matter not in issue. And no court, which was guided by the rules of law, could give judgment against the Defendant on a verdict convicting him of an offence for which he was never arraigned, and to which it was impossible for him to be prepared with any defence.

Taking this to be of the nature of a special verdict, the Court in construing it must confine itself to the facts expressly found, and cannot supply the want of them by any argument, intendment, or implication whatever: in this, all the writers on courts martial before cited agree. *Adye*, 207. *Sullivan*, 75. *MacArthur*, 143.

But it is only in felony that a man can be convicted of a crime of an inferior degree to the crime charged. In misdemeanors there can be no inferior degree, all are misdemeanors; and any other degree must be a different offence. But even supposing that the offence *found* could be deemed to be of the same nature with the offence charged, yet the prisoner should have been acquitted of the offence *charged*, and for want of such acquittal the sentence is void. “If a man be indicted for *murder* and found guilty of *manslaughter* without saying any thing of the murder, the verdict is insufficient and void, as being only a verdict for part. 2 *Hawk. P. C.* 440. If a special verdict only find part of the matter in issue, or do not take in the whole issue, or if the imperfection be such that judgment cannot be given, it is bad.” 2 *Lord Raym.* 1521, 1522. 2 *Stra.* 844.

4. The matter of which the Plaintiff is convicted, is not an offence cognizable by martial law.

The necessity of confining courts martial strictly within their jurisdiction, has already been shewn: and it is not only necessary to confine them strictly within the limits of their authority with respect to the *persons* accused, but also with respect to the offence with which they are accused. The offence found is “the having promoted, and having been *instrumental* towards the inlisting of *Heretage* and *Stephenson* into the service of the *East-India* Company, knowing them at the same time to be long to the *Coldstream* regiment of Foot Guards, and deeming this crime to be precisely of the same nature with that which is set forth in the charge, and to differ only in this, that

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“ that it is *rather* inferior, but in a very slight degree, in point
“ of aggravation, they do adjudge”, &c.

But what, it may be asked, is the meaning of “ *promoting*
“ and being *instrumental* towards their inlisting”? By what
means did the Plaintiff *promote* or become *instrumental* to this?
This ought to have been explicitly stated; as the sentence stands,
it is vague and fallacious.

But taking it for granted, that the court martial had con-
victed the Plaintiff in express words of inlisting these men into
the service of the *India* Company, knowing them to be deserters
from the Guards; this offence is neither within the articles of
war, nor the mutiny act, unless it be within the 53 s. of the act,
which *imposes a penalty of 5l. on any person who shall harbour,*
conceal, or assist any deserter, knowing them to such, on conviction
before a justice of peace, to be levied by distress, and for want of
a distress, three months' imprisonment.

But merely inlisting a soldier who has already deserted, even
though the party knows him to be a deserter, is no offence
either against the mutiny act or the articles of war. If it had
been within either the one or the other, the court-martial would
have shewn it in their sentence, as is usual. *Sullivan*, 101.
The offence, if any, seems to have been that of harbouring or
concealing the men; but that is totally different from promot-
ing and being instrumental towards their inlisting.

[93] The superior courts of *Westminster* have a superintending
power over all inferior courts of what nature soever, and are
by the principles of the constitution entrusted with the ex-
position of such laws and acts of parliament as prescribe the
extent and boundaries of their jurisdiction. So that if such
courts assume a greater or other power than is allowed them
by law, the supreme courts will prohibit and control them.
4 *Bac. Abr.* 241. and the authorities there cited.

Hence it lies to all courts which differ from the common law
in their proceedings.

Besides the Ecclesiastical Courts and the Courts of Admiralty,
it lay to the *High Commission Court*, to the delegates, to the
convocation, to the court of the *constable* and *marshal*. 4 *Inst.*
333, 334.

A court-martial, like every other court, may exceed or abuse
its authority. In that case, if no prohibition lies, there is no
remedy for such abuse, which is absurd.

The

The Court of Common Pleas may grant prohibitions in all cases, without any exception. 4 *Inst.* 99, 100. This was agreed by all the Judges of *England*. In 4 *Inst.* Lord Chancellor *Egerton* called *Fleming*, Chief Justice of *B. R.*, and the other judges of that court, and *Tanfield*, Chief Baron, and the other Barons of the Exchequer, to consider whether the Court of Common Pleas had authority to grant prohibitions without any writ of attachment or plea depending. They were unanimous in the affirmative, according to a multitude of precedents. The Justices of the Common Pleas were not called, having often before determined the point. "So now", says Lord *Coke*, "this question is at peace, being resolved by all the Judges of *England*."

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The difference between the Courts of King's Bench and Common Pleas is this, that in the King's Bench a prohibition may be awarded upon a bare *surmise*, without any suggestion on record, and such writ is only in the nature of a commission *prohibitory*, which is discontinued by the demise of the king^(a); but that as to a prohibition issuing out of the Common Pleas the suggestion must be on record, and therefore is considered as the suit of the party, in which he may be nonsuited, and is not discontinued by the death of the king. *Noy* 77. *Latch* 114. *Palm.* 422. Prohibitions also are not granted *ex gratiâ* by the Court, but *ex debito justitiæ*. If the Spiritual Court exceeds its jurisdiction, upon information, either by the party or a mere stranger, the king's courts will prohibit them, for "prohibitions are not of favour, but of justice to be granted." *Art. Cleri.* 2 *Inst.* 607. "Serjt. *Morton* libelled in the Admiralty; a prohibition was prayed in the King's Bench, *Wild*, King's Serjt, prayed that the Court would allow *Morton* his privilege of being sued in the Common Pleas. The Court doubted whether this privilege should be allowed in prohibition. But *ex assensu partium* it was ordered that the Plaintiff should sue for his prohibition in the Common Pleas. But because the Common Pleas refused the prohibition, it was moved again in the King's Bench; and all the Court were of opinion that prohibitions are grantable *ex debito justitiæ* (and not in the discretion of the Justices, as *Hobart*, 67. says), and after sentence and appeal." 1 *Sid.* 65. Serjt. *Morton's* case. "All the

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(a) But *quære*, whether the words of the stat. 1 Ed. 6. c. 7. s. 1. be not extensive enough to include a prohi-

bition, though it be not considered as a suit between party and party?

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“ Judges agreed that the granting prohibitions is not a discretionary act of the Court, but they are grantable *ex merito justitiæ*; and they denied Lord *Hobart's* opinion in his Reports, “ 67. which *Rolle*, Chief Justice, had frequently done before.”
 Sir *T. Raym.* 3. *Woodward v. Bonithan*.

It was one of the articles of impeachment against Sir *Robert Berkley*, a Judge of the King's Bench, that he had deferred to grant a prohibition to the Ecclesiastical Court, on a suggestion that the suit was for tithes of houses in *Norwich*, although it was moved by counsel many several times; and that on various other occasions he had deferred to grant prohibitions, where by law he ought to grant them. 1 *State Trials*, 713. And where *Holt* and the Court refused to grant a prohibition, they ordered that the suggestion should be entered on the record, that they might enter the reasons of their denial. 1 *Salk.* 136. *Bishop of St. David's v. Lucy*. A prohibition is *ex debito justitiæ*, if the Court of Admiralty proceed contrary to an act of Parliament, per Lord *Mansfield*, 4 *Burr.* 1950. *Howe v. Napier*. Prohibitions being to keep every jurisdiction within its proper limits, the law, as to prohibitions, and the form of them, cannot be altered but by act of Parliament. 2 *Inst.* 601, 602.

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With respect to the practice in prohibition; anciently, prohibitions seem to have been granted as a mere matter of course, and the proceedings in the court below were staid, till it could shew its jurisdiction: almost all the questions of jurisdiction therefore arose on applications for a consultation. Afterwards a suggestion or surmise became necessary, which was not required to be proved, but the Plaintiff was bound to make his declaration exactly conformable to it; for if the Court found that the declaration did not warrant the surmise, they forthwith granted a consultation. 2 *Inst.* 605. This appears by the complaint of the Bishops in the *Articuli Cleri*, where they allege that there was great delay and difficulty in obtaining consultations while prohibitions were granted by any one of the judges out of court, at their chambers. 2 *Inst.* 605. The *stat.* 2 *Ed.* 6. c. 13. s. 14. requiring proof of the suggestion in the case of tithes, was made in favour of the clergy, for such proof was not necessary at common law. If no such proof was necessary in the case of tithes, it was not in any other case, and therefore the practice of proving the suggestion must have begun since that statute. Persons interested, as parishioners, who may not be

be competent witnesses at the trial, may be sufficient witnesses to prove the suggestion under that statute, and after recording the proof of the suggestion, nothing is to be objected against the persons of the witnesses or their evidence. 4 *Bac. Abr.* 246. It seems therefore that slight proof of the suggestion is sufficient. As to the declaration, "when the matter seems doubtful to the Court, upon a question of fact or law, the Plaintiff has leave to declare, that the parties may have the fact properly tried by a jury, or the law solemnly considered." 1 *Burr.* 198. *Rex v. the Bishop of Ely.* If the Court therefore have any doubt in this case, they will allow the Plaintiff to declare in prohibition.

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Adair and Bond, Serjts., argued against the motion to the following effect:—

It is not disputed, that martial law can only be exercised in this country, so far as it is authorized by the mutiny act and the articles of war. The power of the Court to grant a prohibition to a court-martial in certain possible cases, is also allowed. But great caution should be observed not to interfere with military discipline. It is not an affidavit on a mere suggestion, which might be used in every case to avoid or delay punishment, that will of course obtain a proceeding dangerous to all order and regularity in the fleet and army. If the offender and the offence be clearly within the jurisdiction of a court-martial, there can be no ground for either a prohibition or a review in a court of civil judicature.

The first ground on the other side is, that the Plaintiff was not a soldier. But it is not necessary, in order to make a man amenable to military law that he should be a soldier. The act expressly subjects to military law those persons who *receive pay* as such, whether they are really soldiers or not. The old statutes on the subject likewise fix on that circumstance as the criterion by which the engagement is decided: the receiving money, though the person was not inrolled, and afterwards deserting, is felony by those statutes, 18 *Hen.* 6. c. 19. 7 *Hen.* 7. c. 1. 3 *Hen.* 8. c. 5. 5 *Eliz.* c. 5. *Jenk. Cent.* 271. The 23d section of the articles of war, article 2. directs, "that all crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not specified in the said rules and articles, are to be taken cognizance of by a general or regimental

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“ mental court-martial, according to the nature and degree of “ the offence, and to be punished at their discretion.” Now, the Plaintiff having admitted himself to be a soldier, and having been guilty of an act to the prejudice of good order and military discipline, was liable to the jurisdiction of the court-martial; no prohibition therefore ought to issue.

But in fact the Plaintiff was a soldier, and the only objection to the court-martial on this head, is too great indulgence to the Plaintiff: a court of common law would not have suffered him to give evidence to contradict his own admission under his handwriting, and his own repeated acts in the character of a serjeant. It would be enough to say, that there was evidence on both sides before the Court, and that they have formed a conclusion upon it, being a matter clearly within their cognizance; for it would be absurd to say that a court instituted for the purpose of trying soldiers, should not have a power of trying whether they are soldiers or not. The receiving pay as a soldier is decisive evidence that the Plaintiff was subject to their jurisdiction. All the comments made on the return and the letters, are immaterial; but a return made to and by the proper officer is evidence in itself, and does not require to be verified.

With respect to the second objection, an error in receiving or rejecting evidence, is not a ground for prohibition. But the objection itself is not founded in facts applied to Captain *Campbell's* letters and *Heretage's* deposition(a). *Campbell's* letters were called for by the prisoner, not produced against him, and *Heretage's* deposition was read without any objection being made. When an objection was made to the reading *Stephenson's* deposition, it was allowed. And in reality there was no prejudice to the Plaintiff in reading it, as the witness was fully examined *vivâ voce*. The evidence which was rejected, as stated in the affidavit was, first, that of *Turtle*, who was examined; and secondly, that of *Lunt*; for the admission of which no case was stated, nor is it now explained in the affidavit. The object of calling both of them was only to furnish the prisoner with evidence in an action against them, and had no relation to the charge before the Court.

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As to the third and fourth grounds, a man cannot be convicted of an offence not included in the charge, and not of the same nature; but of an offence of an inferior degree and of the

(a) Vide the suggestion and affidavit.

same

same nature, he may. Thus, on an indictment for an assault, with intent to commit murder, a man may be convicted of a common assault. The charge is, "advising and persuading the two drummers to desert, and enlist in the service of the *East India* Company, knowing them to be drummers of the *Coldstream* regiment of Guards." The sentence states, "that the prisoner was instrumental to, and promoting the enlistment," which is stated to be an offence of the same nature, though of an inferior degree. The evidence shews the meaning of the sentence, *viz.* the sending the men to disguise themselves, and furnishing them with disguises, in order to desert, and enlist in the Company's service.

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The Court seems to have doubted, whether advice and persuasion could be by an act only without words, and they refer to the acts done, as included within the charge, which they certainly are. Thus according to Lord *Coke*, the term aiding, comprehends "counselling, abetting, plotting, assenting, consenting and encouraging to do the act." 2 *Inst.* 182. The enlisting with the *East India* Company was an act of desertion, and the only act that could subject the men to the charge of desertion.

Marshall, in reply, insisted upon his former grounds of argument, and urged farther, that receiving pay as a soldier would not alone make the person who received it a soldier; or, at most, he could only be treated as a soldier while he continued to receive it. Now the Plaintiff here received no pay after the month of *December* 1791. Nor was the circumstance of the Plaintiff signing himself Serjeant, conclusive evidence that he was a Serjeant, this being a criminal proceeding, any more than if *A. B.* were to personate the character of a soldier, it would make him liable to be punished as a deserter, though he would be guilty of a fraud. So if a man and woman live together as husband and wife, in a civil action, the husband would not be permitted to deny his marriage, yet, in an indictment for bigamy, the marriage must be strictly proved.

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Cur. advis. vult.

On this day, the judgment of the Court was thus given by

LORD LOUGHBOROUGH. In this case, which arises on a motion for a prohibition, the novelty of the application was a sufficient reason why the Court should grant a rule to shew cause, and give it that consideration which the importance of

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it seemed justly to demand. It has been very fully argued on both sides, and with great ingenuity and ability. Every thing has been said in support of the motion by my Brother *Marshall*, that any talents, ability, or ingenuity could suggest. But upon the result of the whole, the Court are clearly of opinion that the prohibition ought not to issue.

The suggestion begins by stating the laws and statutes of the realm respecting the protection of personal liberty. It goes on to state, that no person ought to be tried by a court-martial for any offence not cognizable by martial law, and so on. In the preliminary observations upon the case, my Brother *Marshall* went at length into the history of those abuses of martial law which prevailed in ancient times. This leads me to an observation, that martial law such as it is described by *Hale*, and such also as it is marked by Mr. Justice *Blackstone*, does not exist in *England* at all. Where martial law is established, and prevails in any country, it is of a totally different nature from that which is inaccurately called martial law, merely because the decision is by a court-martial, but which bears no affinity to that which was formerly attempted to be exercised in this kingdom, which was contrary to the constitution, and which has been for a century totally exploded. Where martial law prevails, the authority under which it is exercised, claims a jurisdiction over all military persons, in all circumstances. Even their debts are subject to enquiry by a military authority: every species of offence, committed by any person who appertains to the army, is tried, not by a civil judicature, but by the judicature of the regiment or corps to which he belongs. It extends also to a great variety of cases, not relating to the discipline of the army, in those states which subsist by military power. Plots against the sovereign, intelligence to the enemy, and the like, are all considered as cases within the cognizance of military authority.

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In the reign of King *William*, there was a conspiracy against his person in *Holland*, and the persons guilty of that conspiracy were tried by a council of officers. There was also a conspiracy against him in *England*, but the conspirators were tried by the common law. And within a very recent period, the incendiaries who attempted to set fire to the Docks at *Portsmouth*, were tried by the common law. In this country, all the delinquencies of soldiers are not triable, as in most countries in
Europe,

Europe, by martial law; but where they are ordinary offences against the civil peace, they are tried by the common law courts. Therefore it is totally inaccurate to state martial law as having any place whatever within the realm of *Great Britain*. But there is by the providence and wisdom of the Legislature an army established in this country, of which it is necessary to keep up the establishment. The army being established by the authority of the Legislature, it is an indispensable requisite of that establishment that there should be order and discipline kept up in it, and that the persons who compose the army, for all offences in their military capacity, should be subject to a trial by their officers. That has induced the absolute necessity of a mutiny act accompanying the army. It has happened indeed, at different periods of the Government, that there has been a strong opposition to the establishment of the army. But the army being established, and voted, that led to the establishment of a mutiny act. A remarkable circumstance happened in the reign of *George* the First, when there was a division of parties on the vote of the army: the vote passed, and the army was established, but from some political incidents which had happened, the party who opposed the establishment of the army would have thrown out the mutiny bill. *Sir Robert Walpole* was at the head of that opposition, and then some of their most sanguine friends proposed it to them: they said as there was an army established, and even if the army was to be disbanded, there must be a mutiny act for the safety of the country. It is one object of that act to provide for the army; but there is a much greater cause for the existence of a mutiny act, and that is, the preservation of the peace and safety of the kingdom: for there is nothing so dangerous to the civil establishment of a state, as a licentious and undisciplined army; and every country which has a standing army in it, is guarded and protected by a mutiny act. An undisciplined soldiery are apt to be too many for the civil power; but under the command of officers, those officers' are answerable to the civil power, that they are kept in good order and discipline. All history and all experience, particularly the experience of the present moment, give the strongest testimony to this. The object of the mutiny act, therefore, is to create a court invested with authority to try those who are a part of the army, in all their different descriptions of officers and soldiers; and the object

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object of the trial is limited to breaches of military duty. Even by that extensive power granted by the Legislature to his majesty to make articles of war, those articles are to be for the better government of his forces, and can extend no further than they are thought necessary to the regularity and due discipline of the army. Breaches of military duty are in many instances strictly defined; they are so in all cases where capital punishment is to be inflicted: and in other instances, where the degree of offence may vary, it may be necessary to give a discretion with regard to the punishment, and, in some cases, it is impossible more strictly to mark the crime than to call it a neglect of discipline.

This Court being established in this country by positive law, the proceedings of it, and the relation in which it will stand to the courts of *Westminster Hall*, must depend upon the same rules, with all other courts which are instituted, and have particular powers given them, and whose acts, therefore, may become the subject of application to the Courts of *Westminster Hall* for a prohibition. Naval Courts Martial, Military Courts Martial, Courts of Admiralty, Courts of Prize, are all liable to the controlling authority, which the Courts of *Westminster Hall* have from time to time exercised, for the purpose of preventing them from exceeding the jurisdiction given to them: the general ground of prohibition being an excess of jurisdiction, when they assume a power to act in matters not within their cognizance.

Another ground of prohibition, which is indeed but a species of the other, is where an act has passed with respect to any authority resident in other courts, as in the Ecclesiastical Court, in which there is an inherent jurisdiction. In such a case, the courts of *Westminster Hall* have conceived that where the authority is limited by an act of Parliament the court which acted differently from the prescription of the act was in that instance exceeding its jurisdiction, and therefore liable to a prohibition. Beyond these two grounds it does not occur to me that there is any other that can be stated, upon which the
[101] Courts of *Westminster Hall* can interfere in the proceedings of other courts, where the matter is clearly within their jurisdiction (a). That they have decided wrong, may be a ground of appeal, may be a ground of review, but not a ground of pro-

(a) [Vide *Wade's Case*, 2 M. & S. 429 (n).]

hibition.—

hibition. That has been distinctly laid down both in this court and in the court of *King's Bench* with respect to the Courts of Prize (*a*), and it is unnecessary to quote authorities upon a point which leave it without a contradictory opinion. With respect to the matter of evidence, where the inferior courts proceed upon the admission of evidence that could not be admitted in a court of law, or upon the rejection of evidence that would be admitted in a court of law, the 12th article of the complaint made against the judges in the reign of *James the First* (*b*), and the answer to that article of complaint, shew distinctly the law upon that subject. The 12th article of complaint is, that the Courts have granted prohibitions to the Ecclesiastical Court upon the ground that the Ecclesiastical Court would not allow the testimony of a single witness to be sufficient in cases where in the common law courts the testimony of one witness would be sufficient, and their interference is the subject of complaint. The answer the judges make to it is, that in matters subject to the exclusive jurisdiction of the Ecclesiastical Courts, as the setting out of tithes, proofs of a legacy, proofs of a marriage, the Courts do not prohibit, though the rule of the Ecclesiastical Court requires more evidence than the common law, to establish the fact; but that where incidentally a matter comes before them, there the Courts of *Westminster Hall*, upon such surmise, will grant a prohibition.

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I have stated the observations generally, upon the nature of an application for a prohibition. The foundation of it must be, that the inferior court is acting without jurisdiction. It cannot be a foundation for a prohibition, that in the exercise of their jurisdiction the Court has acted erroneously. That may be a matter of appeal where there is an appeal, or a matter of review: though the sentence of a court-martial is not subject to a review, there are instances, no doubt, where, upon application to the crown, there have been orders to review the proceedings of courts martial.

My Brother *Adair* justly and correctly said, that a prohibition to prevent the proceedings of a court-martial, is not to be granted without very sufficient ground and due consideration.

(*a*) See *Brymer v. Atkins*, ante, vol. I. 164. and *Home v. Earl Camden*, ibid. 476. and 4 Term Rep. B. R. 382.

(*b*) 2 Inst. 608. *Articuli Cleri*.

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Not that it is not to be granted, because it would be dangerous *in all cases to grant prohibitions; for it would be undoubtedly dangerous if there was a facility in applying for prohibitions, and the sentence were to be stopped for asking it to be further enquired into. But in such cases it is the duty of the court to consider the matter fully and deliberately upon the motion to prohibit, and the Court could not without great danger take the course in such a case which they have done in others where there is no danger in the delay to put the matter in prohibition, and determine it upon the record.

In this case, there are four grounds stated of prohibition. The first is a material one, because if the first ground is made out, that the Court had no jurisdiction over the person, then of course they were proceeding in a case in which by law they ought not to have been proceeding. In considering that ground, it turns upon the allegation that *Grant*, the person applying for the prohibition, was not subject to military law. I take it up, first, upon his affidavit, and where a prohibition is moved upon that ground, it is very material to consider what the party himself has said. In reading over this affidavit it is calculated to convey an opinion by *argument*, that *Grant* was not subject to military law; but he does not maintain any direct assertion upon which there could be an assignment of perjury, that he is not an object of military jurisdiction. Stating the engagement he had entered into with Captain *Campbell*, he says, "he did assume the character of serjeant in the 74th regiment, in order to enable him to carry on the business of a recruiting agent; but that the deponent was never actually inlisted as a soldier." When one knows more of the case as we do by reading the proceedings of the court martial, it appears that he was never actually inlisted as a soldier, and therefore if he commenced originally as a serjeant, the assertion is true; but it affords no conclusion on this affidavit. He says nothing of an attestation, there is no denial that he ever was attested; and there is a circumstance in the proceedings of the court-martial, that gives strong reason to think that it is not a mere omission; because in the letters he produced himself from Captain *Campbell* to him, Captain *Campbell* tells him, (the expression is not "unless you get your attestation" but) "unless you take your attestation to Chatham, and have it entered there." So that the letter speaks of an attestation existing, but not deposited in

in the proper office. He goes on further and states, "that he
 "did receive money from Messrs. *Brummell*, and in the receipts
 "granted by the deponent he *did acknowledge the money
 "there mentioned for his pay, and he believes he did annex the
 "words following "*serjeant in the 74th regiment*," but he says,
 "that at the time he so received the money, and wrote those
 "words, he did not consider himself to be really and truly a
 "serjeant in the 74th regiment, and such words were added to
 "his subscription that it might appear to give it effect." He
 does not deny that he was a serjeant, he does not take that as a
 matter in issue. The assertion is simply of what passed in his
 own mind; and when he states that it was for the purpose of
 giving it effect, he cannot be allowed to say, "I did not mean
 "by this to become truly and really a serjeant; I meant to
 "take the situation, receive the pay, and describe myself as
 "such, and not to be liable to the consequences." That cannot
 be permitted in any case. But after these comments, it comes
 to this, the party applying for the prohibition, when he is to
 state his own case, states himself to be a person not subject to
 military law: this the Court will require in all such cases.
 But if he will not venture to assert that he is neither soldier nor
 serjeant nor of any military description, it is impossible for the
 Court to enter into the argument, and say from the argument
 and circumstances that have been stated this man shall not be
 considered as such, and therefore there is a ground laid for
 prohibition.

But when we come to compare the proceedings of the court-
 martial with the affidavit and the act of parliament, there is
 one circumstance in the act which specifically applies. The
 act does not leave it to a question whether his enlistment and
 attestation is regular or not, but it says, "any person who
 "shall be enlisted or *receive pay as a soldier*." The being in
 pay as a soldier, fixes the military character upon him, and very
 wisely; and my Brother *Bond* has shewn that this has been the
 course of all the acts of parliament which have passed relative
 to the military engagement. The mutiny act squares itself
 with the number of statutes which had passed relative to the
 military services, and the persons who are engaged to serve.
 It was not left to be discussed where there was a remedy by
 indictment, what was the nature of the engagement, or how it
 was contracted, but the mere circumstance of being in pay or
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having received prest-money, fixed on him the military character so as to subject him to the consequences of a felony if he acted in breach of that character. *Grant* has therefore been in pay as a soldier; it appears so upon his affidavit. The objection to the proceedings of the court-martial upon this head, seems to me very fairly to be met by the answer that my Brother *Adair* gave to it; for after the introduction of the receipt it was clearly shewn that he was in pay as a soldier, and there was an end to the enquiry upon that head. It is said, and my Brother *Marshall* put it very ingeniously, that he will only be liable while he is so receiving pay, and that the last receipt of his pay does not prove he was actually in pay at the time of this offence. Whether he was or not, does not appear, and it is not necessary that it should, for a person in pay as a soldier is fixed with the character of a soldier; and if once he becomes subject to the military character, he never can be released, but by a regular discharge. Upon the first part of the case, therefore, I see no kind of doubt that can be entertained, but that this person was in a situation that made him the object of a military tribunal, and that the court-martial were proceeding against a person within their jurisdiction. But it was argued with a great deal of ingenuity, that there was a contrivance here; that by concert between the recruiting officer and him, he was put into this situation; and it was well understood between the officer and him that he was so far only in a military situation as to enable him to receive the pay, and do the recruiting service.

I think, allowing all the extent to that argument, it does not give the case much the more favour, when it comes to be considered that this is the case of a person putting himself into that situation, and visibly having made himself a party to it. But he is a soldier beyond all possibility of doubt; and after having stated that, perhaps it would not be necessary to go a great deal further.

But the second ground is the reception of improper, and the rejection of proper evidence. Here I must again recur to the answer to the complaints of the judges. That all common law courts ought to proceed upon the general rule, namely the best evidence that the nature of the case will admit, I perfectly agree. — But that all other courts are in all cases to adopt all the distinctions that have been established and adopted in courts of com—

mor. —

mon law, is rather a larger proposition than I choose directly to assent to. If, for instance, a witness excommunicated for contumacy were offered, he would not be received in a court of common law (a): it is an established rule, and we are bound by it. But I do not hold that to be quite so extensive, as that it should go to courts martial, naval or military. There are other formal objections that do not affect the credibility of the witness, but in the present case I do not find the objections to be founded in fact. The first objection is the production of the letters of Captain *Campbell*. The affidavit states, that the letters were produced in evidence; but it suppresses in what manner they were produced; it does not state that they were produced as evidence against the Defendant. In fact therefore, the Court would find themselves unable to proceed upon that; and he shews immediately afterwards, by resting upon these letters, that of the letters of Captain *Campbell* he thought he had a right to avail himself, and did avail himself. It therefore amounts only to this, that the letters of Captain *Campbell* were produced. The first of them were brought out at the prisoner's request, and for the whole of his defence he rests upon the letters of Captain *Campbell* upon that part of the charge. As to the deposition of *Heretage* the objection is, that he was asked whether the contents were true as sworn, and the question was not put whether he acknowledged it to be his hand-writing. But in fact, *Heretage* is examined completely and perfectly, and when an objection was made with respect to *Stephenson*, the Court allowed the objection. What injury could he possibly sustain, when this deposition was read over?

The objection is, that *Heretage* had been first examined, and then his deposition read. It was read for the purpose of cross examination: the information could not have been come at if he had not been examined, and there would have been nothing to furnish the matter of a cross examination. Then the return was objected to. That the return may be falsified, my Brother *Adair* never disputed; but that the return need not be verified, he contended rightly. It is then objected, that the question was never asked, how came it that Captain *Campbell* did not attend? But the prisoner summoned, by the Judge Advocate, all the witnesses he thought proper to call. The next objection is, the stopping the examination of *Turtle*, and the not ex-

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(a) [But see stat. 53 Geo. 3. c. 127.]

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amining *Lunt*. Now it appears, that it is not stated in the first place, in the affidavit, to what purpose they were to be examined; and therefore there the application would fail, because it is necessary to shew the Court the intent of their examination. For it is not the demand simply that such a witness should be examined, that a court-martial proceeds upon: but they will ask, for what purpose is such a witness to be called. In another part of the affidavit *Grant* states, that he was not permitted to prove by witnesses that he was not a soldier: but he does not name any one witness, from whom that proof was to result: upon that ground therefore, if it could be a ground for a prohibition, I think there is not such a statement appearing on the affidavit, or supported by the proceedings, that if it were an application to us to grant a new trial, supposing this matter had been tried in this Court, we should have any reason to say, that the Court at the trial had done wrong in their rejection of some part of the evidence, or in the conclusions they drew from the other.

Then the other two grounds are, that *Grant* has not been convicted of the crime contained in the charge; and that the crime, of which he is convicted, is not an offence which makes him liable to the mutiny act. The charge is, the having advised and persuaded two men to enlist in the service of the *East India* Company, knowing them to be soldiers in the *Coldstream* regiment of Guards. This charge is distinct and specific, and the evidence which has been adduced in support of it, fully, in my apprehension, verifies and proves it. In drawing up the judgment of the court-martial they have taken a distinction, which, I confess, I do not perfectly understood. They say that the evidence amounted to a proof that the prisoner had encouraged and promoted the enlistment with the *East India* Company, which was a smaller shade of the offence described by the particular words in the charge. Upon the circumstances of this case, as they stood in the evidence before the Court, the enlistment with the *East India* Company was the act of desertion. There was no desertion, no quitting the service, in the two men getting drunk at different ale-houses, for the changing their clothes, and taking measures in order to desert, would all have been at an end, and entirely at an end, if the next day they had gone back to their regiment. The only thing that fixed them, was their attestation for the service of the Company: and

and therefore by that they had deserted from the service, in which they were engaged. Therefore the inlisting them into the service of the *East India* Company under the circumstances of this case, was conducting them in a direct act of desertion, and was not only *advising* and *persuading*, but doing something more; because *Grant* not only suggested to them the idea of leaving the service in which they were, but was the means of their doing it. Instead therefore of an inferior degree, it appears to me directly and plainly within the words of the charge. If a difference were to be made, it rather tended to an aggravation of the charge: and I think it would be totally unprecedented to make that the subject of a prohibition.

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Taking the whole of the case together, it is clear that there is ground to suppose that they meant to convict him of the charge. But if by the nicety which they used in penning the sentence, that sentence were to be invalidated, it could not be by a prohibition, whatever it might be by a review, or by an appeal. The most that can be made of it, is an error in the proceedings; but we cannot prohibit upon that account. The sentence in the case of an unfortunate admiral, was certainly an inaccurate one. The question there was, whether the Court had not mistaken the law, yet a prohibition was not thought of (*a*). But it is unnecessary to discuss the sentence further; it would be extremely absurd to comment upon it as if it was a conviction

(*a*) It is presumed, that his Lordship here alluded to the sentence against the unfortunate Admiral *Byng*, which was as follows:—

“ The Court, pursuant to an order from the Lords Commissioners of the Admiralty, to Vice Admiral *Smith*, dated 14th *December* 1756, proceeded to inquire into the conduct of the Honourable *John Byng*, Admiral of the Blue Squadron of his majesty's fleet, and to try him upon a charge, that during the engagement between his majesty's fleet under his command, and the fleet of the *French* king, on the 20th of *May* last, he did withdraw or keep back, and did not do his utmost to take, seize and destroy the ships of the *French* king, which it was his duty to have engaged, and to assist such of his majesty's ships as were engaged in the

action with the *French* ships, which it was his duty to have assisted; and for that he did not do his utmost to relieve *St. Philip's Castle*, in his majesty's Island of *Minorca*, then besieged by the forces of the *French* king, but acted contrary to, and in breach of his majesty's command; and having heard the evidence, and prisoner's defence, and very maturely and thoroughly considered the same, they are unanimously of opinion that he did not do his utmost to relieve *St. Philip's Castle*; and also that, during the engagement between his majesty's fleet under his command, and the fleet of the *French* king, on the 20th of *May* last, he did not do his utmost to take, seize and destroy the ships of the *French* king, which it was his duty to have engaged, and to assist such of his majesty's ships as were

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conviction before magistrates, which was to be discussed in a court where that conviction could be reviewed.

I have thus gone through all the circumstances of the case, in order, as far as I can, to shew that the Court have paid great attention to the arguments which have been urged.

With respect to the sentence itself and the supposed severity of it, I observe that the severe part is by the Court deposited, where it ought only to be, in the breast of his majesty. I have no doubt but that the intention of that was to leave room for an application for mercy to his majesty, from the goodness and clemency of whose disposition, applications of this nature are always sure to be duly considered, and to have all the weight they can possibly deserve.

Rule discharged.

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were engaged in fight with the *French* ships, which was his duty to have assisted; and do therefore unanimously agree that he falls under part of the 12th article of an act of parliament of the 22d year of his present majesty, for amending, explaining and reducing into one act of parliament the laws relating to the government of his majesty's ships, vessels and forces by sea; and as that article positively prescribes death, without any alternative left to the discretion of the Court, under any variation of circumstances, the Court do therefore unanimously adjudge the said Admiral John Byng to be shot to death, at such time, and on board such ship, as the Lords Commissioners shall direct.

"But as it appears by the evidence of Lord Robert Bertie, Captain Gardner, and other officers of the ship,

who were near the person of the admiral, that they did not perceive any backwardness in him during the action, or any mark of fear or confusion, either from his countenance or behaviour, but that he seemed to give his orders coolly and distinctly, and did not seem wanting in personal courage, and from other circumstances, the Court do not believe that his misconduct arose either from cowardice or disaffection, and do therefore unanimously think it their duty, most earnestly to recommend him as a proper object of mercy." *M^cArthur on Naval Courts Martial, Append. No. 34.* But now, by 19 Geo. 3. c. 17. s. 3. a court-martial may either "pronounce sentence of death, or inflict such other punishment as the nature and degree of the offence shall be found to deserve."

Saturday,
June 16th.

ALSEPT against EYLES.

An action of debt will lie against a gaoler, for the escape of a prisoner in execution, though the escape were

THIS was an action of debt against the warden of the *Fleet* for the escape of *Francois Gabriel de Vertillac*, a prisoner in execution.

The declaration stated a judgment recovered in the King's Bench, that the prisoner was committed to the custody of the

without the knowledge of, and without any fault whatsoever on the part of the gaoler; who in such case can avail himself of nothing but the act of God or the king's enemies as an excuse.

marshal,

rshal, and afterwards removed by *habeas corpus* to the *Fleet*,
 l that the Defendant wrongfully and unlawfully, and without
 leave and licence of the Plaintiff, permitted and suffered
 a to escape, &c.

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Pleas. 1. *Nil debet*. 2. That the King granted the office of
 arden of the *Fleet* to the Defendant by letters patent; that
 m the time of the granting of the said office, the said prison
 h been, and of right ought to have been, and still of right
 ght to be maintained and repaired by and at the expence of
 majesty, and not by and at the expence of the Defendant;
 t the Defendant took all due and possible care in his power
 prevent the escape; that notwithstanding such care, the said
 Francois *Gabriel* without the consent, privity or knowledge of
 Defendant or his servants, &c. did contrive, conspire, con-
 erate and agree, together with two other persons, whose
 ristian names were unknown, but whose surnames were *Val-*
 and *Imber*, unlawfully to break the said prison by and in
 alf of the said *Francois Gabriel*, and to effect his escape from
 l out of the same: that the said unlawful combination, con-
 racy, &c. having been so entered into, the said two persons
 known in pursuance of such unlawful combination, &c. and
 order to effect the escape of the said *Francois Gabriel*, and
 before the said escape in the declaration mentioned, did
 awfully, secretly and clandestinely, and without the consent,
 of the Defendant or his servants, &c. fling, cast and throw,
 l cause to be flung, cast and thrown, over and across a cer-
 a external wall of the said prison, contiguous and next ad-
 ring to a certain house, part of certain premises situate in
 don aforesaid, commonly called and known by the name of
 e *Bell Savage Inn*, not then and there belonging to the said
 ion, a certain rope ladder, then and there being fastened to
 l suspended from one of the windows of the said house, so
 tiguous and adjoining to the said prison as aforesaid, over-
 king the said wall of the said prison, for the purpose of
 reby then and there effecting the escape of the said *Francois*
briel from and out of the said prison, over the aforesaid wall
 reof; and the said *Francois Gabriel* did thereby, and by
 ans thereof, and in consequence of the insufficient height of
 said wall of the said prison, then and there at the said time
 en, &c. secretly, privately and clandestinely escape from and
 of the said prison, over the said wall thereof, without the
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consent of, or any negligence or default in the Defendant, or any or either of his deputies or servants, &c. That immediately after the said escape of the said *Francois Gabriel*, he made fresh pursuit, &c.; that notwithstanding such fresh pursuit, the said *Francois Gabriel*, together with the said two other persons, before the said *Francois Gabriel* could be retaken, or the said two other persons could be apprehended, and also before the exhibiting of the said bill of the said Plaintiff against the said Defendant, to wit, &c. fled and departed from this kingdom into certain foreign parts, out of the reach of the process of any of the courts of this country, to wit, into the kingdom of *France*, and there from thence continually hitherto have remained and continued, and still are resident and abiding; that at the time of the said unlawful combination, conspiracy, confederacy and agreement, herein mentioned, and also at the time of the said escape of the said *Francois Gabriel*, he the said *Francois Gabriel*, and the said other two persons *were aliens, and each and every of them was an alien, born out of the liegeance of our said lord the now king, to wit, in the said kingdom of France, of parents then and there being subjects of that kingdom; and that they the said Francois Gabriel, and the said two other persons have not, nor had either of them at any or either of the times aforesaid, any lands, tenements or other property, in this kingdom, whereby they could be amenable to the laws or justice of this country, for or in respect of the said escape of the said Francois Gabriel, &c.; that the said escape in that plea mentioned, and the said escape in the said declaration mentioned, were one and the same, and not other or different; and that the Defendant was not warden of the said prison of the Fleet, otherwise than in respect of the said letters patent, &c.*

The third plea did not differ in any material respect from the second.

The replication to the second plea, protesting against the several matters alleged in it, concluded with a traverse, “without this, that the said *Francois Gabriel* did escape from and out of the said prison, without any negligence or default in the said Defendant or any or either of his deputies or servants, &c.”

The replication to the third plea concluded with a similar traverse.

The rejoinder took issue on each of the traverses.

At the trial a verdict was found for the Plaintiff. But a rule ~~was~~
was ~~made~~

was now obtained to shew cause why the verdict should not be set aside, and a new trial granted. The grounds on which this rule was moved for were two: one, that an action of debt would not lie for a *negligent* escape; the other, that the matters disclosed in the plea, which were proved, shewed that there was in fact no negligence on the part of the Defendant.

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Against the rule *Le Blanc* and *Runnington*, Serjts., shewed cause. In answer to the first objection, they urged that there was no distinction, as to the action of debt, between a negligent and a voluntary escape; but that debt would lie on every escape of a prisoner who was in execution. The *stat. West. 2(a)*. first gave a writ of debt against a gaoler, for the escape of a servant or accountant, at the suit of his master. The 1 *Ric. 2. c. 12.* which was made expressly for the purpose of regulating the confinement of prisoners in the *Fleet*, extends the action of debt against the warden to all cases of escapes in execution: and no distinction is made by Lord *Coke* in commenting on these statutes between voluntary and negligent escapes. 2 *Inst.* 382. In *Bonafous v. Walker*, 2 *Term Rep. B. R.* 127. the distinction was so little regarded, that evidence of a negligent escape was holden to be good under a count for a voluntary escape. That in truth debt as well as case will lie for the escape of a prisoner in execution, appears from *Cro. Eliz.* 767. *Cro. Jac.* 288. *Plowd.* 35. *Latch.* 168. 2 *Bulstr.* 310. 3 *Co.* 52 *a.* 1 *Roll. Abr.* 809. 1 *Ventr.* 211. 217. 1 *P. Wms.* 685. *F. N. B.* 93. 2 *Stra.* 873. 5 *Burr.* 2812. 2 *Term Rep. B. R.* 126. With respect to the second ground, on which the rule was obtained, the facts stated in the plea only shew that the escape was not a voluntary one. But it was not necessary to state, on the part of the Plaintiff, any specific act of negligence in the Defendant, every escape which does not arise from the act of God or the king's enemies, being by construction of law a negligent escape, 1 *Roll. Abr.* 808. *tit. Escape*, *Dyer* 66 *b.* 4 *Co.* 84 *a.* And though the reason given in both *Dyer* and *Coke*, why the gaoler is liable, where the prison is broken by persons not alien enemies, (though their force was irresistible,) is, that he has a remedy against them, yet it appears from the year-book 33 *Hen. 6. 1.* that "if a number of the king's subjects who are
" unknown break open the prison in the night and set the
" prisoners loose, in that case the marshal shall be charged,

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(a) 13 *Edw. 1. st. 1. c. 11.*

" C. - -

1792. "for negligently keeping them." So that the liability of the gaoler does not depend on his having a remedy over, against the persons who caused the escape (*a*). But public policy requires, that the keepers of prisoners should be strictly responsible for the safe custody of prisoners, in the same manner as common carriers are for the safe carriage of goods, and that nothing short of the act of God or the king's enemies should excuse them. It was on this principle, that after the gaols in the Metropolis were destroyed by the rioters in the year 1780, an act of Parliament (*b*) was passed to indemnify the gaolers from the consequences of their prisoners escaping; though no actual negligence could be imputed to them, as it was impossible for them to prevent such escapes.

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[112] *Adair, Bond, and Marshall*, Serjts., in support of the rule, argued that it had never been decided that the law with respect to gaolers was the same as with respect to common carriers, and that they were answerable to the same extent, for every escape, except that which was occasioned by the act of God or the king's enemies. In truth a gaoler and a carrier stand in very different situations. According to the doctrine of the cases cited on the other side, a gaoler is liable because he has a remedy over, but that is not the ground of a carrier's liability: according to those cases also, a sudden fire, by means of which the prisoners escape, is a matter of defence of which the gaoler may avail himself, but a carrier still remains chargeable though the goods committed to his care are destroyed by fire, without any negligence on his part, unless the fire were occasioned by lightning. 1 *Term Rep. B. R.* 27. Admitting the law to be, that a gaoler is liable for an escape, effected by persons not of the description of the king's enemies, because he has a remedy against them; in the present case the Defendant ought clearly

(*a*) The argument here used is, that as the persons who break open the prisons are *unknown*, and therefore there can be no remedy against them, the true reason why the gaoler is liable, is not that which is given by *Dyer* and Lord *Coke*. This indeed seems to be supported by the position of *Prisot* in the year-book: but in the same case *Danby* expressly distinguishes between the acts of the king's enemies, against whom the gaoler could have no remedy, and

those of persons within the king's liegeance, against whom an action might be brought. Besides, in that case there was no decision. So that upon the whole, the reasoning in *Dyer* 66 b. and 4 Co. 84 a. does not appear to be contradicted by the year-book.

(*b*) 20 *Geo. 3. c.* 64. There is also a similar provision to indemnify the marshal of the King's Bench prison in the last section of the *stat. 12 Geo. 3. c.* 23.

to be discharged, because it appears, on the record, that the two persons who assisted the prisoner in his escape, were aliens, and had no property in this kingdom, by which they could be amenable to our laws. With respect to the form of the action, there is no decided authority to shew that an action of debt will lie for an escape, where no fault could be imputed to the gaoler. All the cases, where debt has been brought, have been of voluntary escapes. The remedy which the common law points out, is an action on the case, in which it would be open to the Defendant to shew that he was not in fault, and the jury would assess damages accordingly. The statutes *West. 2.* and *1 Ric. 2.* which gave an action of debt on an escape, clearly refer, by fair construction only, to an escape with the knowledge and actual permission of the gaoler and warden; but as in the present case, the escape was entirely without the knowledge or assent of the warden, the common law remedy ought to have been pursued. As every escape of this kind is holden to be a negligent escape by mere construction of law, the replication was wrong in taking a traverse on a matter of legal inference.

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Cur. advis. vult.

LORD LOUGHBOROUGH. In this case the Plaintiff is intitled to judgment, it being clear that an action of debt will lie for the escape of a prisoner in execution. In the year-book 33 *Hen. 6. c. 1. (a)* the action was debt for an escape which was evidently involuntary. In *Plowden* 35, it is debated, whether the action lay at common law, by the statute *West. 2.* or by that of *Ric. 2.*, and an instance is cited (*b*), before the time of *Ric. 2.*, of debt being brought for an escape: but the Court held, that whether it was by the common law or by either of those statutes, yet that the action laid. Lord Coke in 2 *Inst.* 382. refers the action to the construction of the statute of *West. 2.* and in *Plowden* it is said, that the statute of *Ric. 2.* extends to all gaolers, like the statute *de circumspectè agatis (c)*, to all bishops, as well as the bishop of *Norwich*. To the same effect also is 1 *Ventr.* 217. The question therefore is not now open to argument, and the verdict must be entered for the whole sum. With respect to the other point, it is impossible to take that ground. As the law stands, nothing but the act of God or the king's enemies will be an excuse. I take the notion of fire

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(a) Pl. 3.

(b) 45 *Ed. 3.*(c) 13 *Ed. 1. st. 4.*

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being an excuse, to have arisen from some short expressions in the books. In the year-book the words are "*sudden tempest of fire*" (a), but *Rolle* (b) in his Abridgment, and *Dyer* (c) from whom he cites, says, "fire which is the act of God," which seems to mean fire by lightning.

Judgment for the Plaintiff (d).

(a) But in the latter part of the case the expression is, "*Si fuit per sodein aventure de feu*," &c.
(b) 1 Roll. Abr. 808. pl. 6.

(c) *Dyer*, 66 b.
(d) See 4 Term Rep. B. R. 789. *Elliot v. the Duke of Norfolk*.

Saturday,
June 16th.

WARRE against HARBIN.

In an action for bribery on the statute 2 Geo. 2. c. 24. it is not a material variance if the declaration state the precept to have issued to the bailiffs of the borough, but the precept produced in evidence is directed to the bailiff (a).

THIS was an action of debt, for the penalty of the statute 2 Geo. 2. c. 24. for bribery at the last election for the borough of *Seaford*. The declaration stated the writ, and that the Lord Warden issued his precept to the bailiffs and jurats of *Seaford*; but the precept produced in evidence was directed to the bailiff (in the singular number) and jurats. Mr. Baron *Hotham* who tried the cause, thought this a material variance, and therefore the Plaintiff was nonsuited.

A rule having been granted to shew cause why the nonsuit should not be set aside, *Rooke*, Serjeant, shewed cause. Admitting that a slight variance in the precept is not material, according to the doctrine laid down in *King v. Pippet*, 1 Term Rep. B. R. 235, yet here an integral part of the corporation is mistaken, and a variance in the name of a corporation is fatal in a lease or in a contract. *Gilb. Hist. C. P.* 228. 2 Lord Raym. 1516. *Stra.* 787. The declaration states a precept giving a false description of the corporation: and this being a penal action, is to be strictly construed.

Bond and Runnington, Serjts., *contra*. Penal actions are to be considered as civil suits. *Cowp.* 382. *Atcheson v. Everitt*, and the variance is in a mere matter of inducement. In *Cuming v. Sibly* (b), the declaration stated the precept to be directed to the Mayor only, but the precept given in evidence was directed to the Mayor and Burgesses, which was holden to be an imma-

(a) [Vide *Dickson v. Fisher*, 4 Burr. 2269. *Rex v. Leefe*, 2 Campb. N. P. C. 139. *Draper v. Garratt*, 2 B. & C. 2. Vide ante, vol. 1. 49. 162.]

(b) *East*, 9 Geo. 3. C. B. cited by *Buller, J.*, in *King v. Pippet*, 1 Term Rep. B. R. 239.

terial

terial variance. This is not in fact a mistake in the name of a corporation, *Seaford* not being a corporation; the cases therefore which regard the proper denomination of a corporation are not applicable.

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The Court were afterwards clearly of opinion, on the authority of *Cuming v. Sibly*, that the variance was immaterial, and therefore made the

Rule absolute to set aside the nonsuit.

BRIGGS *against* Sir FREDERICK EVELYN.

Saturday,
June 16th.

TROVER for a gun. The facts of the case were these; the Plaintiff, who was a game-keeper of the manor of *Effingham* The lord of a manor, who is also a justice of the peace, is entitled to a month's notice of an action brought against him for taking away a gun in the house of an unqualified person, by *stat. 24 Geo. 2. c. 44.* for it will be presumed that he acted as a justice (a).

(a) [The protection of the statute 24 Geo. 2. c. 44. and of similar statutes, extends to all persons intending to act within them. Therefore an excise officer, who, acting as such, receives money for duties under a statute which has been repealed, is entitled to notice under 23 Geo. 3. c. 70. s. 30. *Greenway v. Hurd*, 4 T. R. 553. "It has been frequently observed by the Courts, that the notice which is directed to be given to justices and other officers before actions are brought against them, is of no use to them when they have acted within the strict line of their duty, and was only required for the purpose of protecting them in those cases where they intended to act within it, but by mistake exceeded it." *Per Lord Kenyon, ibid.* So one magistrate committing the mother of a bastard child is entitled to notice under 24 Geo. 2., though two magistrates only have jurisdiction in such case, for he intended to act as a magistrate at the time, however mistakenly. *Wheller v. Toke*, 9 East, 364. And where he has authority over the subject-matter of the complaint, although the place where the offence was committed is not within his jurisdiction, he is still entitled. *Prestridge v. Wood-*

man, 1 B. & C. 12. See also *Graves v. Arnold*, 3 Campb. N. P. C. 242. *Gaby v. Wilts Canal Company*, 3 M. & S. 580. *Theobald v. Crichmore*, 1 B. & A. 227. *Waterhouse v. Keen*, 4 B. & C. 200.

But where the act in question has not been done in the capacity of justice, &c. and cannot be referred to that character, but is wholly *diverso intuitu*, notice is not required; as where a revenue officer seizes goods not liable to seizure, and takes money to release them, in an action to recover such money no notice is requisite. *Irving v. Wilson*, 4 T. R. 485. So in an action against a tax-collector, not in respect of an act done in the execution of his office, but for his neglect to pay over money which he ought never to have taken, he is not entitled to notice under *stat. 43 Geo. 3. c. 92. s. 70*, which provides that no writ or process shall be sued out for any thing done in pursuance of that act till after one month's notice. *Umphelby v. M'Lean*, 1 B. & A. 42. So where the Defendant, who was a justice of the peace, and also mayor of a borough, had received a fee for granting a licence to a publican, it was held that such fee could not have been taken by him in his character of justice, and that he was not

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ham in *Surrey*, sent a gun to a blacksmith, between the 20th and 30th of *August* 1791, to be mended. The blacksmith having repaired it, kept it some time in his house, but did not use it. The Defendant, who was Lord of an adjoining manor, in which the blacksmith lived, and also a justice of the peace, on the 17th of *September* went together with his own game-keeper to the blacksmith's house to search for guns and other engines used for the destruction of the game, and finding the gun in question, took it away. It was objected at the trial, that the Defendant ought to have had a month's notice of the action, according to the *stat. 24 Geo. 2. c. 44*, having acted as a justice of the peace, under the powers given by *stat. 5 Anne, c. 14. s. 4.* and on that objection the Plaintiff was nonsuited.

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A rule having been granted to shew cause why the nonsuit should not be set aside, Mr. Justice *Gould*, who tried the cause, stated the evidence, and that he was of opinion at the trial, that the Defendant was intitled to notice, having acted, though erroneously, in his character of a justice of the peace. And he mentioned the case of *Stiles v. Coxe, Vaugh. 111*, in which it was holden, that justices and other officers of the peace, who acted in such official capacity, though wrong, were intitled to have the *venue* laid in the county where the trespass was committed, by *stat. 21 Jac. 1. c. 12*.

Bond, Serjt., shewed cause. The principle of *Stiles v. Coxe* is applicable to the present case, *viz.* that justices and other peace-officers are intitled to the favour of the law, where they have intended to act within the line of their authority, but by mistake have exceeded it, under which circumstances, they are to have a month's notice of the action, that they may have an opportunity of tendering amends, and pleading the tender. Now the *stat. 5 Ann. c. 14.* empowers a justice personally to seize any engine for the destruction of the game, in the custody of an unqualified person; the Defendant under that power took the gun; and whether the taking were justifiable or not, he was intitled to notice by *24 Geo. 2. c. 44*.

Adair, Serjt., in support of the rule. Admitting the proposi-

not entitled to a notice. *Morgan v. Palmer*, 2 B. & C. 729. If it be equivocal in what capacity the party acted, notice should be given, *ibid.* 734.

Replevin is not an action within

the statute. *Fletcher v. Wilkins*, 6 East, 283.

The case is equally within the statute, where the Plaintiff waives the tort, and brings an action of *assumpsit*. *Waterhouse v. Keen*, 4 B. & C. 211.]

tion that the provisions of the Legislature were intended for the protection of persons supposed to have acted wrong, but in the exercise of a legal authority, yet here, the Defendant was not acting as a justice, and cannot therefore avail himself of that character; he acted as lord of the manor, and was attended by his game-keeper. The statutes 22 & 23 *Car. 2. c. 25.* and 4 & 5 *W. 3. c. 23.* are the only acts which authorize the entering and searching houses for game, and engines for the destruction of game: the first of these requires that there shall be a warrant from a justice of peace to the game-keeper to authorize the search; the second, empowers the constable to enter and search, having a similar authority from a justice. But neither of them empower the justice himself personally to enter. The statute 5 *Anne c. 14.* indeed authorizes a justice of the peace to take away dogs, nets or other engines from unqualified persons, but gives him no authority to enter houses; and that act purposely omits *guns*, which must be used for the destruction of the game, otherwise are not liable to be seized. There is no pretence therefore to say that the Defendant in this case acted as a justice; and the Court will not extend the provision of the Legislature, merely because he happened to be a justice of the peace, as well as lord of the manor.

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BRIGGS
against
Sir
FREDERICK
EVELYN.

But the Court said, that though justices of the peace could not avail themselves of their privilege as justices, where they acted in any other capacity which was *diverso intuitu*, yet as in the present case the subject matter was within their jurisdiction, the Defendant was to be taken to have acted as a justice, and therefore intitled to notice, previous to the commencement of the action.

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Rule discharged.

BESFORD *against* SAUNDERS.

Saturday,
June 16th.

THIS was an action of *assumpsit* for money paid, lent, had and received, &c. Pleas, *non assumpsit*, and the general plea of bankruptcy.

If a bankrupt
after obtain-
ing his certi-
ficate pro-
mise to pay
a prior debt,
when he is

At

able, in a general *indebitatus assumpsit* brought on that promise, the Plaintiff must prove the ability of the Defendant to pay (a).

(a) [So in case of a promise to pay charged under the Insolvent Act.
a pre-existing debt, by a person dis- *Campbell v. Sewell*, 1 Chitty's Rep.
609.]

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 ———
 BESFORD
 against
 SAUNDERS.

At the trial, the Plaintiff proved two several applications to the Defendant, who admitted the debt after he had obtained his certificate, and said, “ the Plaintiff should be no loser, but “ *that he would pay when he was able.*”

Le Blanc, Serjt., contended, that this was not an absolute promise, but that the Plaintiff ought to shew the Defendant’s ability to pay, at the time of the action brought. Lord *Loughborough* over-ruled this objection, and held, that the promise was absolute, and the benefit of the certificate waived, as to this debt. In consequence of which a verdict was found for the Plaintiff.

A rule being granted to shew cause why there should not be a new trial, *Cockell*, Serjt., shewed cause. He argued that it was a settled point, that a promise to pay after bankruptcy was a waiver of the certificate, the prior debt being a sufficient consideration for a new promise.

Le Blanc admitted there was a sufficient consideration, but said, that the promise must be taken as it was made, *viz.* conditional, and not absolute.

GOULD, J., and HEATH, J., were of opinion that it was a conditional promise, and that the Plaintiff ought to have shewn that the Defendant was able to pay.

LORD LOUGHBOROUGH retained his former opinion, that the promise was not conditional, and that an inquiry into the circumstances of the Defendant could not be a point in considering whether there were a debt or not.

Rule absolute for a new trial.

609. So where the Defendant has promised to pay a debt barred by the Statute of Limitations, “ if he can”, it is a conditional promise, and the Plaintiff must prove his ability to do so. *Davies v. Smith*, 4 Esp. N. P. C. 36. But see *Thompson v. Osborne*, 2 Stark. N. P. C. 98. *Loweth v. Fother-*

gill, 4 Camp. N. P. C. 185. See, however, *Fleming v. Hayne*, 1 Stark. N. P. C. 371. By stat. 6 G. 4. c. 16. s. 131 — the promise must be made in writing signed by the bankrupt, or by some person thereto lawfully authorized in writing by such bankrupt.]

END OF TRINITY TERM.

During all this term Mr. Justice WILSON was sitting in the Court of Chancery as one of the Lords Commissioners of the Great Seal.

CASES

C A S E S

ARGUED AND DETERMINED

1792.

IN THE

Court of COMMON PLEAS,

IN

Michaelmas Term,

In the Thirty-third Year of the Reign of GEORGE III.

FLETCHER, One, &c. *against* AINGELL.

Wednesday,
June 21st.

is Case was omitted by mistake in the Reports of the last Term.]

THE Plaintiff who was an attorney, having in last *Hilary* Term recovered judgment in the *King's Bench*, against the defendant, on the 3d of *February* sued out an attachment of privilege against the bail in this court on their recognizance, and on the 23d of *January*, and returnable on *Wednesday next the morrow of the Purification*, which was the *eighth of February*. On the *eleventh of February* the Defendant was rendered and an *exoneretur* entered; notwithstanding which, the plaintiff signed judgment against the bail, and then brought an action on that judgment in the *King's Bench*.

Bail sued on their recognizance by attachment of privilege, may render the principal on the appearance day of the return (a).

In consequence of this, a motion was made in that court to reverse the proceedings, and a rule there made to refer it to prothonotaries to report as to the regularity of the proceedings in this court against the bail. But some difficulties having arisen, it was agreed to bring the matter on for argument in court; the only material question being at what time bail, when sued by attachment of privilege, ought to render their principal, either on the *return day* of the writ, or on the *quarto die post*, in common cases?

(a) [Vide *Lardner v. Bassage*, post. 593.]

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FLETCHER
against
AINGELL.

Lawrence, Serjt., contended that the render on the 11th of *February* was good. An attachment of privilege is in the nature of an original writ, *Haward v. Denison, Barnes*, 410. and if the Plaintiff had brought his action of debt by the common process and not by attachment, the bail would have been intitled to time to render the principal in, till the *quarto die post* of the return of the writ (a). *Impey's Pract. C. B.* 502.

Adair, Serjt., insisted, on the contrary, that, however the case might be, where the proceedings were between common persons, yet the established practice was, that where the Plaintiff sued by attachment of privilege, the bail could not render the principal after the return day of the writ. *Impey's Pract. C. B.* 502.

Pcr Curiam. The rule of practice ought to be uniform, as to the time in which bail may render the principal; and there is no good reason why they should not have the same time allowed, where the proceedings are by attachment of privilege, as in other cases, viz. till the appearance day of the return.

The prothonotaries afterwards reported to the Court of *King's Bench* that the render on the eleventh of *February* was regular.

(a) A different practice in this respect, prevails in the *King's Bench*, where if an action be brought on the recognizance, the bail have eight entire days in full term, next after the return of the writ, in which they may render the principal, and if there be but four days in the term after the return, then four days in the following term. R. Trin. 1 Ann. 1 Lord Raym. 721. Imp. Pract. B. R. 448.

In both courts where the bail are sued by *scire facias*, and the proceed-

ings are by *original*, they have till the *quarto die post* of the return of the first *scire facias*, if *scire feci* be returned, or if *nihil* be returned, till the *quarto die post* of the return of the second *scire facias*, to render the principal. Where the proceedings are by *bill* in B. R. the time for rendering is the return day of the *scire facias*, and in all these cases it is absolutely necessary that the render be made *sedente curiâ*. [Vide post. 593.]

GANESFORD against LEVY.

Friday,
Nov. 9th.

A Plaintiff
who is resi-
dent abroad,
is compell-
able to give

security for costs, though no other circumstance than his residence be stated in the affidavit (a).

IN this case a motion was made by *Le Blanc*, Serjt., that the Plaintiff should give security for costs, on an affidavit which stated

(a) [It is difficult to reconcile all the cases as to the practice of this court in requiring security for costs. In the case of *Parquot v. Eling, ante*, vol. 1. p. 106. the Court refused to

grant a rule, on the mere ground of the Plaintiff being resident abroad, while in the principal case it is laid down as a settled point, that where a Plaintiff resides in a foreign country he

stated simply "*that his place of residence was at Bourdeaux in France,*" without any other circumstances. *Adair*, Serjt., shewed cause, and urged that in many cases (a) the Court had refused to require a Plaintiff to give such security, merely because he was resident abroad, without other circumstances being stated. But

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against
LEVY.

Upon consideration, the Court made the rule absolute, and laid it down as a settled point to guide the practice in future, that when a Plaintiff resided in a foreign country, and so out of the reach of the process of the Court, he might be called upon to give security for costs, though no other circumstance were stated in the affidavit (b).

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he may be called upon to give security for costs, though no other circumstance is stated in the affidavit. It is said in a note by the Reporter, *post.* 384. that the being resident abroad is of itself a ground upon which a rule to shew cause will be granted, but that such rule will not be made absolute unless some special circumstances appear to induce the Court to order the security. It seems, however, to be the present practice to make the rule absolute, unless some special circumstances are shewn on the part of the Plaintiff, to exempt him from the general rule. See *Tidd's Pr.* 579. 8th edit. Thus a foreign seaman serving on board an *English* ship cannot be called upon to give se-

curity. *Jacobs v. Stevenson*, 1 Bos. & Pul. 96. So a foreigner during his absence from this country on board his own ship, if he reside here part of the year. *Durell v. Mattheson*, 3 B. Moore, 33. *Nelson v. Ogle*, 2 Taunt. 253. S. P. So an *English* subject who is a prisoner in *France*. *Tulloch v. Crowley*, 1 Taunt. 18. *O'Lawler v. Macdonald*, 8 Taunt. 736. 3 B. Moore, 77. S. C. Security for costs will not be granted after the Defendant has agreed to take short notice of trial. *Michel v. Pareski*, *post.* p. 593.]

(a) See *ante*, vol. i. p. 106. *Parquot v. Eling*.

(b) In two cases last term, *viz.* *Miche v. Airey*, and *Kelly v. Leve-more*, there were similar decisions.

MALLET against HILTON.

LE BLANC, Serjeant, moved for judgment as in case of a nonsuit, on an affidavit stating that issue was joined in *Easter* Term last, and notice of trial given for the sittings after that term, and countermanded; that notice of trial was again given for the sittings in *Trinity* Term, and again countermanded.

Friday,
Nov. 9th.

A peremptory undertaking to try, is alone sufficient cause to shew against judgment as in case of a nonsuit for not proceeding to trial, if it be the first default (a).

Kerby, Serjt., shewed cause in the first instance, by offering

if it be the first default (a).

(a) [But in K. B. some reason must be assigned for not proceeding to trial, or the Court will not compel the Defendant to accept a

peremptory undertaking. *Walter v. Buckle*, 2 Chitty's Rep. 244. *Tidd's Pr.* 826. 8th edit.]

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 MALLETT
 against
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to undertake peremptorily to try the cause at the sittings, in or after the present term, but did not give any reason, by affidavit or otherwise, why the Plaintiff had not proceeded to trial before.

Le Blanc objected to this, as being contrary to the practice both of this Court and the *King's Bench*, and evasive of the statute (a). But

The Court held, that in all cases where an application was made for the first time for judgment, as in case of a nonsuit, it was sufficient, in answer to such an application, to undertake peremptorily to try, without alleging any reason for not having before tried the cause; and that, whatever might have been the former practice, in future it should be understood that the first motion for judgment as in case of a nonsuit, was only a mode of obtaining a peremptory undertaking to try.

In this term also, the Court laid down the same rule in a case of *Price v. Green*.

(a) 14 Geo. 2. c. 17.

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 Thursday,
 Nov. 15th.

SHEERS *against* BROOKS and Others.

Bail above may justify the breaking and entering the house of A. (the outer door being open) in which the principal resides, in order to seek for him, for the purpose of rendering him. Such a justification is good without averring that the principal was in the house at the time. And in such a plea an averment that the defendants "duly became bail and entered into a recognizance" is sufficient, without stating that the principal was delivered to their custody (a).

TRESPASS for breaking and entering the dwelling-house of the Plaintiff, making a noise and disturbance therein, and staying and continuing in the same for a long space of time, to wit, for the space of 12 hours, &c. &c.

Plea (after the general issue) "as to the breaking and entering the said messuage or dwelling-house, and making a noise and disturbance therein, and staying and continuing in the said messuage or dwelling-house, &c. for a short space of time, to wit, for the space of one hour, part of the said time in the said declaration mentioned", &c. &c. "That one *Harry Phillips* the elder had commenced a certain action or suit against one *Robert Barry*, one *Nicholas Kempson*, one *Peter*

(a) [The house of the Plaintiff was considered, in this case, to be the house of the principal; and therefore the justification of the party entering did not depend upon the fact of the principal being within at the time,

as it would have done had the house been considered the house of a stranger. See *Hutchinson v. Birch*, 4 Taunt. 619. *Cooke v. Birt*, 5 Taunt. 765. *Johnson v. Leigh*, 6 Taunt. 246.]

"*Solomons*

“ *Solomons Duprey*, and one *Harry Phillips* the younger, in
 “ the Court of our lord the King of the Bench here, to wit at
 “ *Westminster* aforesaid, in a certain plea of trespass on the
 “ case upon promises, to the damage of the said *Harry Phillips*
 “ the elder, of 280*l.* as it was said, &c.

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 against
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“ And the said *George*, *Robert Smith*, and *John* (the defend-
 “ ants) further say, that after the commencement of the said
 “ action or suit, and whilst the same was depending in the said
 “ court here, and before the said time when, &c. in the said
 “ declaration mentioned, to wit, in *Easter Term*, in the thirty-
 “ second year of the reign of our lord the now king, they the
 “ said *George* and *John* came before *Alexander Lord Lough-*
 “ *borough* and his companions, then his Majesty’s justices of
 “ the bench here, to wit, at *Westminster* aforesaid, and then
 “ and there, according to law duly became bail for the said
 “ *Nicholas* in the said action or suit, so as aforesaid depending
 “ in the said court here, by then and there entering into a re-
 “ cognizance to the said *Harry Phillips the elder*, whereby the
 “ said *George* and *John* did severally acknowledge to owe unto
 “ the said *Harry Phillips* the elder the sum of 280*l.* each, to
 “ be levied upon their several goods and chattels, lands and
 “ tenements, upon condition, that if the said *Nicholas* should
 “ be condemned in the said action he should pay the condemn-
 “ ation-money, or render himself a prisoner to the *Fleet* for
 “ the same, and if he should fail so to do, they the said *George*
 “ and *John* did undertake to do it for him; and the said
 “ *George*, *Robert Smith*, and *John* further say that after they
 “ the said *George* and *John* had so as aforesaid entered into the
 “ said recognizance, whilst the said recognizance remained in
 “ due force, and whilst the aforesaid action or suit was depend-
 “ ing in the said court here, to wit, at the said time when, &c.
 “ in the said declaration mentioned, the said *Nicholas* used,
 “ occupied and resided in the said messuage or dwelling-house of
 “ the said *Sarah* (the Plaintiff) in the said declaration men-
 “ tioned, in which, &c. and whilst the said *Nicholas* used, occu-
 “ pied and resided in the said messuage or dwelling-house of the
 “ said *Sarah*, in the said declaration mentioned, in which, &c.
 “ they the said *George* and *John* as the bail of and for the said
 “ *Nicholas* as aforesaid, and the said *Robert Smith* in aid and
 “ assistance of them the said *George* and *John*, and at their re-
 “ quest, at the said time when, &c. in the said declaration men-
 “ tioned,

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tioned, broke and entered into the said messuage or dwelling house of the said Sarah, in the said declaration mentioned, in which, &c. by the *outer door* thereof, the said *outer door thereof being then open (a)*, in order to seek for, and if there found, to apprehend and take the said Nicholas in the said messuage or dwelling-house of the said Sarah, to surrender him to the said prison of the Fleet, in discharge of themselves the said George and John from the said recognizance so by them entered into as aforesaid, as they lawfully might for the cause aforesaid", &c. &c.

To this plea there was a general demurrer.

Lawrence, Serjt., in support of the demurrer, made two points of argument; 1st. That it did not appear that the defendants were in a situation to justify the taking of *Kempson* (the principal) in any place; 2d. That they had no right to take him in the house of the Plaintiff. As to the first he argued, that to intitle bail to take their principal, the principal must have been delivered to them as bail by the Court. 4 *Inst.* 178. 2 *Hawk. P. C.* 88. but the plea in the present case, shews only that the Defendants were sureties for the appearance of *Kempson*; it does not state that he was delivered to them as bail by the Court, and the difference between bail and mainprise is obvious. As to the second point, he urged that bail could not, in any event, enter the house of another, to take the principal, unless the principal were in the house at the time: now it is not averred in the plea, that *Kempson* was in the Plaintiff's house at the time of the entry. *Cro. Eliz.* 876. Nor could such an entry be justified, merely because it was stated that the principal *used, occupied and resided* in the house, those being vague and equivocal terms, which might be applied to any one who had a temporary residence there, such as a visitor, or servant.

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Bond, Serjt., *contra*. The Defendants were not mainpernorrs, but bail: the plea states that they "duly became bail"; this allegation is sufficient, and is not contradicted by stating that they entered into a recognizance, &c. As therefore they were bail, they had a right to take the principal, and were justified in searching for him at his usual place of abode. And in *Semayne's case*, 5 Co. 91 a. it is laid down, that "the house of

(a) See 5 Co. 91 b. *Semayne's case*, and Cowp. 1. *Lee v. Gansel*, and the cases there cited.

“ any one is not a castle or privilege but for himself, and
 “ shall not extend to protect any person who flies to his
 “ house.”

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LORD LOUGHBOROUGH. This plea appears to me to be good, both in form and substance. It shews that the Defendants were bail, and not mainpernors, for it states that they duly became bail and entered into a recognizance, the legal effect of which is, that the principal was in their custody; and a further averment of his being delivered to them would have been unnecessary: when a party is bailed, the bail have a right to go into the house of the principal, as much as he has himself; they have a right to be constantly with him, and to enter when they please, to take him. And I see no difference between a house of which he is solely possessed, and a house in which he resides by the consent of another.

GOULD, J. I think this plea is good, and sufficiently certain to a common intent, and that the subsequent statement of the entering into a recognizance is not sufficient to invalidate the prior allegation of the Defendants having duly become bail. It seems to me to be the same in effect, as if the principal had been sole occupier of the house; the Plaintiff received him into her house, subject to all the legal consequences, to which he would have been liable, if the house had been his. A contrary determination would affect the liberty of the subject, as it would make it extremely difficult to procure bail.

HEATH, J., of the same opinion.

Judgment for the Defendants.

PHILLIPS *against* FIELDING.

[123]

Monday,
Nov. 26th.

IN this action of *assumpsit* for the non-performance of a special agreement, the declaration contained nine counts, the first

By the conditions of the sale by of auction of a copyhold

estate, it was stipulated that the purchaser should pay down a deposit, and sign an agreement for payment of the remainder of the purchase-money at a certain time, *on having a good title*, and that he should *have a proper surrender* of the estate, on payment of the remainder of the purchase-money. In an action brought by the seller, for the non-performance of the conditions on the part of the purchaser, it was not sufficient to state that the seller *had been always ready and willing, and frequently offered to make a good title to the said estate, and to make a proper surrender on payment of the purchase-money*. But the declaration ought to have averred that the seller actually made a good title, and surrendered the estate to the purchaser, or a tender and refusal, and also to have shewn what title the seller had (a).

(a) [Vide *Glazebrooke v. Woodrow*, 8 T. R. 366. But where in a similar

action the Plaintiff averred that he was seised in fee of the land, and that

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 against
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of which stated, that the Plaintiff on the 10th of September 1791, at *Westminster*, in the county of *Middlesex*, “was about
 “to expose to sale, and to sell by way of public auction, a
 “certain copyhold estate of him the said *William*, (the Plain-
 “tiff) that is to say, a certain copyhold messuage or dwelling
 “house, consisting of two parlours, a kitchen, and useful of-
 “fices, with a garden behind the same, then in the occupation
 “of one *Edward Corey*, situate and being in the parish of
 “*Titchfield*, in the county of *Hants*, under the following con-
 “ditions of sale, to wit, *First*, that the highest bidder should
 “be the purchaser, and if any dispute should arise between
 “two or more bidders, the estate should be put up again.
 “*Second*, that no person should advance less than 2*l.* at each
 “bidding. *Third*, that the purchaser should pay down imme-
 “diately a deposit of 20*l.* *per cent.* in part of the purchase
 “money (*a*), meaning the sum of 20*l.* upon each and every 100*l.*
 “of the sum at which he should purchase such estate, and sign
 “an agreement for payment of the remainder on or before
 “*Christmas Day* then next, meaning the 25th day of *December*
 “which was in the year of our Lord 1791, *on having a good title.*
 “*Fourth*, that the purchaser should have a proper surrender of the
 “estate at his own expence, on payment of the remainder of the pur-
 “chase money according to the third condition, at which time the
 “purchaser would be intitled to the rents and profits of the estate.
 “*Fifth*, there being a duty on all sales of estates by auction of
 “threepence halfpenny in the pound, to be levied on the
 “buyer or seller as may be thought most proper, the said es-
 “tate should be sold, subject to the buyer paying the said tax,
 “exclusive of the sum the said estate should sell for. *Sixth*, it
 “the purchaser should neglect or fail to comply with the con-
 “ditions before mentioned, the deposit money should be for

that the Defendant agreed to purchase it on having a good title, and that his title to the land was made good, perfect, and satisfactory to the Defendant; and that he (the Plaintiff) had been always ready and willing, and offered to convey the lands to the Defendant, the declaration was held good on demurrer. *Martin v. Smith*, 6 East, 555. and see *Ferry v. Williams*, 8 Taunt. 62. 1 B. Moore, 498. S. C. As the purchaser in the principal case was to have a proper surrender at his own expense, it ap-

pears not to have been the vendor's duty to prepare or tender the conveyance. See Sugd. Vend. & Purc. 222. 6th Ed. and the averment of readiness and willingness would therefore appear to have been sufficient. The case of *Phillips v. Fielding*, if not over-ruled by *Martin v. Smith*, must at all events be considered of doubtful authority, see 8 Taunt. 67.]

(a) But see 4 Co. 17 b. as to the office of an inuendo.

“feite—d,

feited, the proprietor should be at full liberty to re-sell the said estate, and the deficiency (if any) by such second sale, together with the charges attending the same, should be made good by the defaulter at such sale. *Lastly*, the purchaser should pay the auctioneer one guinea at the fall of the hammer; of all which said premises, he the said *George* (the Defendant) afterwards, to wit, on the said 10th day of *September*, in the year 1791, aforesaid, at *Westminster*, in the said county of *Middlesex*, had notice, and thereupon afterwards, to wit, on the same day and year last aforesaid, at *Westminster* aforesaid, in the said county of *Middlesex*, in consideration that the said *William* at the special instance and request of the said *George*, had then and there undertaken and faithfully promised the said *George* to perform and fulfil every thing contained in the said conditions of sale on his part and behalf, as the vendor of the said estate, to be performed and fulfilled, he the said *George* undertook, and then and there faithfully promised the said *William* to perform and fulfil the said conditions of sale in all things therein contained, on the part and behalf of the buyer or buyers of the said estate to be performed and fulfilled, if he the said *George* should buy the same at the said sale. And the said *William* further saith, that the said intended sale of the said estate, afterwards, to wit, on the same day and year last aforesaid, at *Westminster* aforesaid, in the said county of *Middlesex*, was accordingly begun, made, and ended under the aforesaid conditions of sale; and the said *George* at the said sale became and was the highest bidder for the said estate, and then and there under the said conditions of sale, bought and purchased the said estate with the appurtenances, at and for the price or sum of 170*l.* of lawful money of *Great Britain*, and then and there signed a certain agreement in writing bearing date on the same day and year last aforesaid, whereby he agreed to become purchaser of the said premises, subject to the aforesaid conditions of sale, at and for the price or sum of 170*l.*; whereupon according to the said conditions of sale, and the said promises and undertakings of the said *George*, and the said agreement so by him in this behalf made as aforesaid, he the said *George* then and there became liable to pay to the said *William* the said sum of 170*l.* according to the aforesaid conditions of sale; and the said *William* further saith, that

“ although

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“ although he the said *William* hath well and truly performed
 “ and fulfilled the said conditions of sale in all things therein
 “ contained, on his part and behalf to be performed and fulfilled according to his said promises and undertakings, yet
 “ the said *George* not regarding the aforesaid conditions of
 “ sale, nor his said promises, undertakings and agreements so
 “ by him in this behalf made as aforesaid, but contriving and
 “ fraudulently intending craftily and subtilly to deceive and
 “ defraud the said *William* in this respect, did not pay down
 “ immediately on such purchase being so by him made as aforesaid to the said *William* or any other person or persons for
 “ his use, a deposit of 20*l.* per cent. in part of the said purchase money or any deposit whatsoever, nor did he on or
 “ before the 25th day of *December* in the year 1791, aforesaid, pay, nor hath he at any other time whatsoever yet hitherto
 “ paid to the said *William* or to any other person or persons to or for his use, the said sum of 170*l.* being the purchase
 “ money for the aforesaid premises according to the aforesaid conditions of sale, and according to his said agreement or
 “ any part thereof, although so to do, he the said *George* was requested by the said *William*, afterwards, to wit, on the day
 “ and year last aforesaid, and often afterwards, to wit, at *Westminster* aforesaid, in the county of *Middlesex*, and although
 “ the time limited by the said conditions of sale for the payment of the said purchase money hath long since elapsed,
 “ and although the said *William* hath always been ready and willing, and hath frequently offered to make out a good title to
 “ the said estate, and to make a proper surrender of the said estate to the said *George* on payment of the said purchase
 “ money, but the said *George* to pay any deposit or to pay the said purchase money or any part thereof to the said *William*,
 “ hath hitherto wholly refused and still refuses so to do, and the said purchase money still remains and is wholly due and
 “ unpaid to the said *William*, contrary to the aforesaid conditions of sale, and the said promise and undertaking of the said
 “ *George*, and his said agreement so by him in this behalf made as aforesaid, to wit, at *Westminster* aforesaid, in the said
 “ county of *Middlesex*; by means of which said several premises, the said *William* hath wholly lost and been deprived
 “ of the benefit of the said sale by auction, and of the selling of his said estate, and the said *William* was thereby put to
 “ great

“ great and unnecessary expence of his money, and delay in the
 “ sale of his said estate, and by reason of the premises aforesaid,
 “ was and hath been and is otherwise much injured and damni-
 “ fied, to wit, at *Westminster* aforesaid, in the said county of
 “ *Middlesex*.”

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In the second, third, fourth, and fifth counts, the respective estates which the Plaintiff was about to sell, were described as being really different from each other, but in all other respects those counts were similar to the first, reciting the same conditions of sale, and containing the same allegations. The re-

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maining four were the common money counts.
 To the first five counts there was a general demurrer, and to the four last *Non Assumpsit* was pleaded.

In support of the demurrer, *Marshall*, Serjt., argued as follows,

There are two objections to this declaration. 1st. The Plaintiff has not shewn a sufficient performance of the agreement on his part, by stating an actual surrender to the Defendant, or a tender and refusal, which is equivalent. 2nd. Though he states that he was ready and willing, and offered to make a good title to the estate and a proper surrender, yet he does not shew, *what title*.

1. By the third condition of sale, the purchaser is to pay down 20*l. per cent.* in part, and to sign an agreement to pay the remainder on or before *Christmas Day, on having a good title*: and by the fourth, he is to have a proper surrender of the estate at his own expence, *on payment of the remainder*. These two conditions taken together, amount to this; the purchaser is to pay the money at or before *Christmas* on having a good title, the seller is to make a good title on payment of the money. No terms could have been used more explicit to frame *concurrent* conditions. The promises are to be fulfilled at the same time, each being the condition upon which the other is to be performed; and though it is not certain that either party is bound to do the first act, yet if either would have a remedy at law for the non-performance of the other, he must perform his own part; for unless he can shew a performance of his part, or an offer to perform and a refusal by the other party, he cannot support an action. Instead of this, the Plaintiff in the present case brings an action against the Defendant for not doing the first act: he says he has been always ready and will-

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ing, and frequently offered to "make out a good title to the estate and a proper surrender, *on payment of the purchase money;*" so that the allegation imports that if the Defendant had *previously* paid him the money, he would *afterwards* have made out a good title, thus making payment a condition precedent. The general rule laid down by Lord *Holt* has never been departed from, but in cases which have been afterwards over-ruled. That rule is, that in executory contracts if the agreement be that one shall do an act, and for doing it the other shall pay, &c. the doing the act is a condition precedent to the payment, for the party who is to pay shall not be compelled to part with his money till the thing be performed for which he is to pay. *Thorpe v. Thorpe*, 1 *Salk.* 171. 1 *Lutw.* 245. 12 *Mod.* 455. 1 *Ld. Raym.* 662. and S. P. 1 *Salk.* 112. *Callo-nett v. Briggs*. The rule indeed is subject to some distinctions: as, if a day of payment be appointed, which falls before the thing can be performed, an action may be brought for the money before the thing be done, it then appearing that the party relied upon his remedy, and did not mean to make the performance a condition precedent. It follows therefore, that though the conditions be concurrent, yet if either party would bring an action against the other for non-performance, he turns his part of the contract into a condition precedent, and he must aver performance or a tender and refusal; the reason of which is, that when a man undertakes to do a thing, he ought to shew his utmost endeavour to do it, and if it be not done, the reason why it is not done. *Bro. tit. Condition.* pl. 62. *Lea v. Exell*, *Cro. Eliz.* 888. *Lancashire v. Killingworth*, 1 *Ld. Raym.* 686. *Com. Rep.* 116. 12 *Mod.* 529. 2 *Salk.* 623. Thus in *Large v. Cheshire*, 1 *Ventr.* 157. the Plaintiff declared on an agreement, whereby the Defendant covenanted to pay him such a sum, *the Plaintiff making to him a sufficient estate in certain lands, before* such a day, and avers that, although he was always ready to perform the agreement on his part, yet the Defendant had not paid the money. The Defendant pleaded that he offered to pay the money, if the Plaintiff would make him a good estate in the premises. The Plaintiff replied, that he sealed a deed of feoffment, and came on the premises before sun-set on the day, to deliver seisin, but neither the Defendant nor any person for him, came to receive it. On demurrer to this replication, the Court held, that the words "*making him a sufficient*"

"estate"

"*estate*", were a condition precedent, and therefore the Plaintiff should have averred performance *particularly*, and not in such general words. Thus also in *Russell v. Ward*, Sir W. Jones, 218. cited by Lord Holt in *Thorpe v. Thorpe*, 1 *Ld. Raym.* 665. the executor of *A.* declared against *B.* that in consideration, *A.*, in his life-time, had promised to assure certain lands to *B.* before *Michaelmas* next, *B.* promised to pay him so much for the land; that is, the assurance was to be made before *Michaelmas*, and the money was to be *paid for the land*; it was adjudged, that the action would not lie for the money without making an assurance of the land.

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Even where the promises are mutual and independent, yet if one be the consideration of the other, each is a condition precedent to the other, and performance must be averred, unless a certain day be appointed for the performance. Thus, if *A.* [128] agree to pay 100*l.* to *B.* in six months, *B.* transferring so much stock to *A.*, and *B.* gives a note to transfer the stock to *A.*, he paying the 100*l.*; if *B.* sues for the 100*l.* he must aver that he transferred, or a tender and refusal; and if *A.* sues for not transferring, he must aver and prove payment, or a tender and refusal of the 100*l.* *Wyoill v. Stapleton*, 8 *Mod.* 68. 381. And the manner of the performance must be shewn. Thus, in *Austin v. Jervoise*, *Hob.* 69. 77. the Plaintiff declared, that he had bought a horse of the Defendant for 22*s.* paid down, and 11*l.* more to be paid at the death or marriage of the Plaintiff, for which he should become bound with sufficient surety by writing obligatory, and that the Defendant, in consideration thereof, promised to deliver the horse when he should be required, and averred that afterwards he offered to become bound to him, but the Defendant had not delivered the horse. On *non assumpsit*, and verdict for the Plaintiff, the judgment was arrested, because the Plaintiff had not stated that he had tendered the obligation sealed, nor what security he had offered. This doctrine, *viz.* that either a performance or a tender and refusal, which is equivalent to it, must be shewn, is fully recognized by recent authorities, *Jones v. Barkley*, *Dougl.* 684. 8vo. edit. *Kingston v. Preston*, there cited, and *Goodisson v. Nunn*, 4 *Term Rep. B. R.* 761.

2. But supposing the Plaintiff had stated explicitly and formally, that he had offered to make a good title to the Defendant, and that the Defendant had refused to accept it; yet the declaration

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[129] ation would still be bad, because it does not shew *what title*. If the Plaintiff had no title, he could not recover damages against the Defendant for not paying for an estate to which the seller could not make a title, though the Defendant would have had a remedy against him for his breach of contract. The title therefore is an essential part of the case. But whether a title be good or not, is a question for the Court to decide, and therefore it ought to appear with sufficient certainty, on the face of the record. If it be so stated, the Defendant will be able to take issue on any fact alleged if untrue, or demur if the title set forth be defective. But the merely alleging that he was ready and willing to make a good title, is not an averment of his title, upon which an issue can be taken either of law or fact. If it be stated that a person is *patron* of an advowson or *heir*, it must be shewn *how* he is patron or heir, for no issue can be taken on *patron* or *heir*. 1 *Ld. Raym.* 202. Still less can an issue be taken on the word *title*, being much more vague and less appropriated in its signification. In an action upon a covenant to enjoy without eviction, the breach must shew *what title* the person had who recovered. *Cro. Jac.* 315. *Kirby v. Hansaker*, S. P. *Broking v. Cham.* *Cro. Jac.* 425. So in covenant for quiet enjoyment, the breach assigned was, that *A. habens legale jus et titulum* entered upon the Plaintiff; after verdict for the Plaintiff, this was holden to be no breach without shewing *what title* *A. B.* had. *Wootton v. Hele*, 1 *Sid.* 466. *Saund.* 177. Thus also where the Plaintiff declared, that in consideration he would acquit one *T. O.* of a debt, and permit him to carry his goods off the premises, the Defendant promised to pay the Plaintiff 10*l.* at a certain day: and averred that he *acquitted and discharged* the said *T. O.*, and suffered him to carry away his goods; but the Defendant had not paid *the* 10*l.*; after verdict for the Plaintiff the judgment was arrested, because the Plaintiff did not shew *how* he acquitted *T. O.*, for it could not be without deed, which ought to have been particularly shewn. *Cro. Jac.* 503. *Leneret v. Rivet*. So in debt on an obligation, the Defendant pleaded, that it is indorsed, *that if the Defendant should come to Bristol such a day, and shew the Plaintiff a sufficient discharge of an annuity, that then, &c.* and averred that he came to *Bristol* on the day, and tendered to shew a sufficient discharge of the annuity, and that the Plaintiff *refused to see it*. The Plaintiff demurred, and after great argument it

was held to be no plea by all the justices, because the Defendant did not shew *what discharge* he tendered. *Bro. tit. Condition. pl. 183.*

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So too the Plaintiff declared, that in consideration that he would relinquish a rent charge which he had out of the Defendant's land, the Defendant promised to pay him 30*l.* and averred that *he did relinquish it*. After verdict for the Plaintiff, this was held insufficient, without shewing *how* he relinquished it: for it might be by parol, which is no discharge. *Cro. Eliz. 292. Gregory v. Nevill.* Thus likewise in *assumpsit* on an agreement, by which the Defendant was to take of the Plaintiff certain premises with the fixtures, &c. or else to forfeit a deposit of 5*l.* 5*s.* with a penalty of 5*l.* to be paid by the party who should fail; the Plaintiff averred that he was ready and willing to deliver the premises, &c. to the Defendant, at such an appraisement in pursuance of the agreement, but the Defendant did not accept the said premises, &c. On demurrer, the Court (without hearing the Defendant's counsel) held, that as the Plaintiff was to *deliver possession*, he ought to do so; and to do that, he should have shewn that he had an interest in the premises. *Luxton v. Robinson, Dougl. 620.* And nearly the same objections as are now taken to this declaration, were made in the case of the *Duke of St. Albans v. Shore*, (*ante*, vol. I. 273.) and though the Court in that case gave judgment on the plea, yet a strong opinion was intimated that those objections would, of themselves, have been fatal.

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Cockell, Serjt., contra. It appears on the face of the declaration that there is a sufficient inducement to the promise of the Defendant for the breach of which he is liable. It is stated that the Plaintiff was about to sell by auction "an estate of him the said Plaintiff", and afterwards, that "although he hath frequently offered to make a good title", yet the Defendant refused to perform his part; and it is objected, that these allegations are insufficient. Now supposing the objection to be well founded, it being a matter of form, ought to have been pointed out by a special demurrer, but cannot be taken advantage of on a general demurrer. But in truth the allegations are sufficient to enable the Plaintiff to maintain his action. It is not necessary to set out the title particularly, unless the Defendant makes it so by pleading: it is sufficient *primâ facie*, to state the contract, and if the Defendant object to the want of title,

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it lies upon him to impeach it. Here the Defendant was to do the first act, to pay for, and consequently prepare the surrender, a more distinct averment therefore was not necessary, on the part of the Plaintiff; but *paratus fuit et obtulit* is sufficient. *Davis v. Ridgeway*, 1 Roll. Abr. tit. Condition. 465. pl. 31. And that "*licèt*" makes an express averment, appears from *Com. Dig. tit. Pleader. (C. 77.)* and the authorities there cited. But if it be not certain, which party is to do the first act, but both are to do something at the same time, and one refuse to do his part, in that case, he who was ready and offered to perform his part, may maintain an action against the other, according to the mode of reasoning adopted in *Jones v. Barkley*, and *Kingston v. Preston*.

[131] *Marshall* in reply. These cannot be considered as independent conditions, where each party relies on his remedy for the performance of the other; for if they were, then the Plaintiff might bring an action for the money without conveying, and the Defendant might sue for a conveyance without paying. As to the argument, that *paratus fuit et obtulit* is sufficient, the true distinction is, that if the consideration is to be performed before the action is brought, performance must be expressly and fully averred, and the general allegation "*paratus fuit et obtulit*" is not sufficient. *Cro. Jac.* 583. But if nothing is to be done on the part of the Plaintiff, till the Defendant has done a prior act, there it is sufficient; as if the Plaintiff being a bailiff, agree for 10*l.* to arrest *I. S.* at the suit of the Defendant, it is sufficient to aver that he was ready and willing, and offered, but the Defendant did not deliver him the writ, which was the case of *Davis v. Ridgeway*, 1 Roll. Abr. tit. Condition. 465. cited for the Plaintiff. So also if a request be part of an agreement, and the debt or duty is to commence on the request, it must be specially alleged with time and place; as if in consideration that the Plaintiff would assure certain lands to *I. S.*, the Defendant promised that if *I. S.* did not pay so much on request, he would pay it; it is not enough to say, that *I. S. licèt sæpius requisitus* did not pay, for the request to *I. S.* is material, to make the Defendant chargeable, and must be specially alleged. *Cro. Eliz.* 85. But where the debt or duty exists before any request, there the general request "*licèt sæpius requisitus*" is sufficient; and even that is not necessary, because the bringing the action is itself a request.

Lord

LORD LOUGHBOROUGH, after censuring in very strong terms the length of the declaration (*a*), held, that it was clearly bad, on both the grounds insisted on in the argument; First, Because the Plaintiff had not distinctly averred a sufficient performance of his part of the agreement, by stating an actual surrender to the Defendant or a tender and refusal; and Secondly, Because he had not shewn *what* title he had to the estate; for whatever his interest was, it ought to have been specially set forth.

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GOULD, J., was of the same opinion. He remembered the case of an indictment for forgery, in which there were three counts for the forgery, and three for the utterance; in the first count the prisoner was particularly described, and the grand jury having rejected the three first counts, an objection was raised, that the remaining counts described him "*the said A. B.*" by reference to the first: but all the judges held, that the description was good, and that the latter counts might refer to the former. So in the present case, the declaration, which was swelled to a very improper and unnecessary length, [132] might have referred generally to the conditions of sale set forth in the first count, without repeating them over again in the subsequent counts.

HEATH, J., was of the same opinion.

Judgment for the Defendant.

(*a*) But the fact was stated in court to be, that there were five different estates, sold in five separate lots, for

the purchase of which the Defendant signed five separate agreements.

END OF MICHAELMAS TERM.

In the beginning of *Hilary* Term 1793, Lord LOUGHBOROUGH, LORD CHIEF JUSTICE of this Court, was appointed LORD HIGH CHANCELLOR of *Great Britain*.

On *Monday Feb. 4*. The Chancellor came into court to take the oaths on his new appointment, and sat for a short time as Chief Justice. Before he retired, his Lordship took leave of the Bench and the Bar in a very elegant address, expressive of his gratitude for the uniform attention and respect which he had received, during the time he had presided in this court.

To which Mr. Serjt. *Adair*, as senior Serjeant, answered in the name of his Brethren.

At the end of the Term, Sir JAMES EYRE, Knt., LORD CHIEF BARON of the EXCHEQUER, was appointed LORD CHIEF JUSTICE of this Court.

During the Term, no material Cases were decided.

C A S E S

ARGUED AND DETERMINED

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IN THE

Court of COMMON PLEAS,

IN

Easter Term,

In the Thirty-third Year of the Reign of GEORGE III.

TATEM *against* CHAPLIN.

Friday,
May 3rd.

[THIS was an action of covenant, brought by the lessor of a farm against the assignee of the lessee, for the breach of the following covenant. “ And the said *Samuel Norfolk*, (the lessee,) for himself, his *executors* and *administrators*, did covenant, promise and agree, to and with the said *George Tatem* (the lessor), his heirs and assigns, that he the said *Samuel Norfolk*, his *executors* and *administrators*, should and would constantly during that demise, with his and their family and servants reside, inhabit and dwell in and upon the said demised messuage or tenement, farm and lands, and in default thereof, would pay or cause to be paid to the said *George Tatem*, his heirs or assigns, the sum of five pounds of lawful money of *Great Britain*, as a penalty for every month he or they did not or should not reside, inhabit or dwell in and upon the said demised premises, over and above the yearly rent then and there reserved, &c.

A covenant in a lease that the lessee, his executors and administrators, shall constantly reside upon the demised premises during the demise, is binding on the assignee of the lessee, though he be not named.

The breach assigned was “ that the said *Richard Chaplin* (the assignee) after the said assignment of the said demised premises to the said *Richard*, and during his possession thereof, to wit, from the 9th day of *May* in the year of our Lord 1790, to the day of filing the original writ of the said *George*, hath not, nor did during such time as aforesaid,

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“with himself, his family and servants, reside, inhabit and
 “dwell, nor does he now reside, inhabit, and dwell, *in and*
 “*upon the said demised messuage or tenement, farm or lands,*
 “but on the contrary hath *totally absented* himself with his
 “family and servants from the same, for a long space of
 “time, to wit, for the space of two years and three months,
 “yet the said *Richard Chaplin* hath not paid or caused to be
 “paid to the said *George Tatem* the sum of 5*l.* of lawful money
 “of *Great Britain*, as a penalty for each and every month he
 “the said *Richard Chaplin* with his family and servants as
 “aforesaid, have not resided, inhabited, and dwelt, in and
 “upon the said demised premises, over and above the yearly
 “rent so then and there reserved, or any part thereof, but
 “hath therein wholly failed and made default, contrary to the
 “form and effect of the aforesaid covenant of the said *Samuel*
 “*Norfolk*, so made with the said *George Tatem*, in that behalf
 “as aforesaid, &c.” To this there was a general demurrer.

There were also issues joined on the breaches of other covenants.

Runnington, Serjt., argued in support of the demurrer, and the only material point of his argument was, that the covenant in question did not run with the land, and therefore did not bind the assignee, who was not named in it, within the principle of the third resolution in *Spencer's Case*, 5 Co. 16 a. He also cited *Mayo v. Buckhurst*, Cro. Jac. 438. *Brewster v. Kitchen*, 1 Lord Raym. 317. *Churchwardens of St. Saviour's v. Smith*, 3 Burr. 1271.

On the other side *Bond*, Serjt., contended that the covenant ran with the land, and was binding on the assignee, though not named: that the third resolution in *Spencer's Case* related only to personal covenants, and therefore did not affect the present case, but that the first resolution was, “when the
 “covenant extends to a thing *in esse*, parcel of the demised
 “the thing to be done by force of the covenant is *quodammodo*
 “annexed and appurtenant to the thing demised, and shall
 “with the land, and shall bind the assignee, although he
 “not bound by express words.” And the sixth resolution
 “If lessee for years covenants to repair the houses during
 “term, it shall bind all others as a thing which is appurtenant
 “and goeth with the land, in whose hands soever the
 “shall come, as well those who come to it by act of law

act of the party, for all is one having regard to the lessor. If the law should not be such, great prejudice might accrue to him; and reason requires, that they who shall take benefit of such covenant when the lessor makes it with the lessee, should on the other side be bound by the like covenant when the lessee makes it with the lessor." So also in *Dean & Chapter of Windsor's Case*, 5 Co. 24 a. it is laid that "such covenant which extends to the support of the thing demised, is *quodam modo* appurtenant to it, and with it."

In the present instance the covenant clearly extended to the support of the thing demised.

The Court said, though the deed was very ill drawn, they were nearly of opinion, that the covenant in question was *modo* annexed and appurtenant to the thing demised, according to the first and sixth resolutions in *Spencer's case*, which were directly in point, and therefore that the assignee could, though he was not named.

Judgment for the Plaintiff.

TATEM and Others, Assignees of WHITESETT, a Bankrupt, against JENKINS.

Friday,
May 10th.

WHITESETT, in contemplation of insolvency, and with a view to defeat the claims of his creditors, sold a large quantity of goods to the Defendant *Jenkins*. Soon after the Defendant committed an act of bankruptcy, and his assignees brought this action of trover to recover the value of the goods. Having failed to prove at the trial a demand and refusal, however, the Lord Chief Justice was of opinion that they could not recover, there being no evidence of a conversion. It was agreed that the opinion of the Court should be taken, and a rule was accordingly obtained to shew cause why a non-prosecution should not be entered; against which *Lawrence*, Serjt.,

A trader on the eve of bankruptcy makes a collusive sale of goods to A. The assignees cannot maintain trover for them, without proving a demand and refusal (a).

but a sale of a ship (afterwards at sea) made by the Defendant who claimed under a defeasance from a trader before bankruptcy, is a sufficient consideration to enable the assignees to bring trover without a demand and refusal. *Bloxam v. Hubbard*, 5

East, 407. And a bankrupt may bring trover against his assignees, in order to try the validity of the commission without any previous demand and refusal. *Summersett v. Jarvis*, 3 Brod. & Bing. 2. See also 2 Saund. 47. g. (notes).]

now

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now shewed cause. He contended that a demand and refusal was necessary to support an action of trover, only in cases where the possession was originally lawful; here it was a wrongful possession, inasmuch as the bankrupt had no right to make a fraudulent sale of his effects in order to cheat his creditors. And he cited 1 *Sid.* 264. 1 *Leon.* 223. 4 *Burr.* 2477. *Hob.* 187.

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But the Court held, that a demand and refusal were necessary to maintain the action. When the sale was made, the parties were competent to contract; there was no unlawful taking of the goods, though the transaction was liable to be impeached by the assignees. They might either affirm or disaffirm the contract, and if they thought proper to disaffirm it, they ought to have demanded the goods, a refusal to deliver which would have been evidence of a conversion.

Rule absolute for entering a nonsuit.

Monday,
May 13th.

BUCKLAND, Executor of ELIZABETH BARTON, *against*
BARTON.

A bond conditioned for the payment of a sum of money to such person as *A. B.* shall by will appoint, is not forfeited by non-payment to the residuary legatee of *A. B.* no specific appointment having been made.

A power of appointment by will is not executed by a mere devise of the residue (a).

THIS was an action of debt, on a bond conditioned for the payment of an annuity of 40*l.* a year to the testatrix during her life, “ and also in case she the said *Elizabeth Barton* shall “ happen to depart this life at any time during or before the “ expiration of five years from the day of the date of the above “ written obligation, then, and in that case, if he the said “ *James Barton*, (the Defendant,) his heirs, executors and administrators, or any or either of them, do and shall well and “ truly pay, or cause to be paid, to such person or persons as “ she the said *Elizabeth Barton* shall in and by her last will “ and testament in writing, or in and by any writing purporting to be her last will and testament, to be by her signed “ and sealed in the presence of two or more credible witnesses, “ nominate, direct or appoint to have or receive the full and “ just sum of one hundred pounds of lawful money of *Great Britain*, without any deduction, defalcation or abatement “ whatsoever out of the same, for or on account or pretence

(a) [Vide *Roe, d. Reade, v. Reade*, 8 T. R. 118, and *Doe, d. Nowell, v. Roake*, 2 Bingh. 497, in which most of the modern cases on the subject of the execution of powers are cited.]

“ of

“ of any matter, cause, or any thing whatsoever, within the
 “ time or space of six months next after the time of the decease
 “ of her the said *Elizabeth*, then the above written obligation
 “ shall be void, &c.”

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The Defendant, after oyer of the bond and the above condition, pleaded that “ the said *Elizabeth Barton* did not in and
 “ by her last will and testament, &c. nominate, direct or ap-
 “ point any person or persons to have or receive the said sum
 “ of 100*l.* &c.”

The Plaintiff replied, that “ the said *Elizabeth Barton* did
 “ duly make her last will and testament, &c. and did thereby
 “ nominate, direct and appoint the said Plaintiff to have and
 “ receive the said sum of 100*l.* &c. &c.” Upon which fact an
 issue was taken in the rejoinder. The will of *Elizabeth Barton* referred to a former bond given by the Defendant for the securing her an annuity of 30*l.* a year, and which was afterwards cancelled, but took no notice of the bond in question, or of any power of appointment; but in support of the affirmative of the
 issue, the Plaintiff relied on the following residuary clause,
 “ And as to all the rest, residue and remainder of my ready
 “ money, personal estate, and effects whatsoever and whereso-
 “ ever, not hereinbefore given and disposed of, (except the
 “ sum of 10*l.* which I gave and bequeath to *A. B.* to be paid
 “ to him by my executor immediately after my decease) I give
 “ and bequeath the same to the said *Marmaduke Buckland* (the
 “ Plaintiff) for his own use, &c.” and obtained a verdict. But
 a rule was granted to shew cause why the verdict should not be
 set aside, and a nonsuit entered, against which

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Bond, Serjt., shewed cause, contending that the property of the 100*l.* was vested in the testatrix *Elizabeth Barton*; and that though no specific appointment was made of it, yet it passed to her devisee under the residuary clause in her will. That though the case of *Pease and another v. Mead*, Hob. 7. and *Moore*, 855. might be cited on the other side, that was overruled by subsequent decisions, 2 *Atk.* 172. *Bainton v. Ward*, 2 *Vern.* 319. *Thompson v. Towne*, 465. *Lassels v. Ld. Cornwallis*, 181. *Robinson v. Dugale*, in which last case there were no equitable considerations in favour of creditors, but “ *I. S.*
 “ having devised his lands to *A.* for life, remainder to *B.* in
 “ fee, he paying four hundred pounds, whereof two hundred
 “ to

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 ———
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“ to be at the disposal of his wife, in and by her last will and
 “ testament, to whom she should think fit to give the same,”
 and the wife dying intestate, it was decreed that her admini-
 strator was intitled to the 200*l.* the property being vested in
 her. If therefore in that case the money went to the repre-
 sentative of the wife, so ought it to go in the present instance,
 where there is a specific devise of the residue of her effects.

Le Blanc, Serjt., in support of the rule. The question on
 these pleadings, on which the issue is taken, is, whether the
 Plaintiff *Buckland* were appointee of the testatrix? Now as an-
 other bond is referred to in the will, and that in dispute not
 mentioned, it is to be presumed that she did not mean to make
 any appointment under that bond. With respect to the au-
 thorities cited on the other side, the cases of *Bainton v. Ward*,
Thompson v. Towne, and *Lassels v. Ld. Cornwallis*, proceeded on
 the ground of a court of equity interfering for the payment of
 creditors, in preference to other persons; and in *Robinson v.*
Dusgale, the grounds of the decision are not fully stated.
 But the case of *Pease v. Meade*, is good law, where, as it is
 reported *Godb.* 192., *Cook* made this distinction, “ if I be
 [138] “ bounden to pay 10*l.* to the assignee of the obligee, and his
 “ assignee makes an executor, and dieth, the executor shall
 “ not have the 10*l.* But if I be bounden to pay 10*l.* to the
 “ obligee or his assignees, there the executor shall have it, be-
 “ cause it was a duty in the obligee himself.” And other cases
 are expressly in favour of the Defendant, and shew that a mere
 devise of the residue is not an execution of a power of appoint-
 ment. *Molton v. Hutchinson*, 1 *Atk.* 558. *Ex parte Caswell*,
 559. *Andrews v. Emmott*, 2 *Brown. Rep. Chanc.* 297.

EYRE, Lord Chief Justice. I cannot consider the 100*l.* in
 this case as any part of the wife's estate, and unless that point
 can be established, it clearly cannot pass under the devise of
 the residue. As to the cases which have been cited from
 2 *Vern.* 319. and 465, in those cases the money subject to the
 power was the party's own money; in one secured by bond, in
 the other by a charge on the estate, and if not disposed of, it
 resulted back; and the Court held, that though there was no
 appointment executed, yet being the party's own money, it was
 assets for the benefit of creditors; so that in those cases the
 money was only left where it was before. With respect to the
 case

case in 2 *Vern.* 181, it is difficult to say that the money was vested in the wife, though the Court are stated to have holden that doctrine; for if it were vested in her, she might have called for it in her lifetime (a). But a reason may be given why the Court in that case might hold that it was vested in her, which is this, the payment of 400*l.* was a condition precedent to the vesting of the land in the party who was to pay it; it was therefore a liberal construction, and for the benefit of the party, because, being a condition precedent, the estate might be considered as not vested in him without it. But the case of *Pease v. Meade* is directly in point, and the reason given by *Cook* in the report in *Godbolt*, is the true one, that if a man be bound to pay a sum of money to the obligee or his assigns, there the executors shall have it, because it was a *duty in the obligee himself*. So if in the present case it could be shewn that there was a duty in the wife herself, that instance would be applicable; but she was not to take, there was no duty in her, and therefore the money could not pass to her assignee in law, it being in that character only that her executor could claim it. For it is sufficiently clear from the latter cases cited by my Brother *Le Blanc*, that a mere devise of the residue does not amount to an execution of a power of appointment. As to the cases, where money so circumstanced has been made assets in favour of creditors, those cases have been decided on principles peculiar to a court of equity; but decisions in a court of equity afford no authority for a court of law, unless they proceed on legal grounds. It is a matter for a court of equity to supply the defective execution of a power, but all we can do is, to see whether the money passed to the executor, that is, whether it were part of the wife's personal estate. But there is no case which has gone that length, where a bond has been conditioned for the payment of money to the nominee of a third person.

GOULD, J., of the same opinion.

HEATH, J., of the same opinion.

The true rule as to powers of appointment by will is laid down in *Sir Edward Clere's Case* (b), viz. that where one has a power to appoint by will, but makes a will without any reference to the

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(a) [But a gift of a sum to the testator's wife, to be disposed of as she thinks proper, to be paid after her death, is not a power, but vests

the whole interest in the legatee. *Heron v. Oliver*, 13 Ves. 108, and see Sugd. on Powers, 102. 2d edit.]

(b) 6 Co. 17 b.

1793. power, the appointment shall have no effect, unless the
would otherwise have no operation: which principle is allu
to in the case in equity last cited by my Brother *Le Blanc*
BUCKLAND
against
BARTON. WILSON, J., of the same opinion.

(a) *Andrews v. Emmot*, 2 Brown's Reports Chan. 297.

END OF EASTER TERM.

C A S E S

ARGUED AND DETERMINED

1793.

IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER CHAMBER,

IN

Trinity Term,

In the Thirty-third Year of the Reign of GEORGE III.

MASTER *against* MILLER.

[*In the Exchequer Chamber in Error.*]

See the declaration and special verdict at length, 4 *Term Rep.*
B. R. 320. [And see S. C. in error, 1 *Anstr.* 225.]

Wednesday,
June 5th.

ON behalf of the Plaintiff, *Wood* argued as follows. It has been contended, on the other side, in the Court below, that the acceptor of the bill was discharged from his acceptance by the alteration of the date, though made without the know-

An alteration of the date of a bill of exchange, by which the day of payment would

be brought forward, vitiates the bill, and no action can be maintained upon it after such alteration, though in the hands of an innocent indorsee for a valuable consideration (a).

(a) [The principle of this case is not confined to negotiable instruments: thus an alteration will avoid a broker's sale-note, *Powell v. Divett*, 15 East, 30; or a policy of insurance, *French v. Patten*, 1 Campb. N. P. C. 72. To avoid the instrument, the alteration must be in a material part, *Trapp v. Spearman*, 3 Esp. N. P. C. 57. *Marson v. Petit*, 1 Campb. N. P. C. 82 (n.) and see *Tidmarsh v. Grover*, 1 M. & S. 735. *Cowie v. Halsall*,

4 B. & A. 197, and where the alteration is merely the correction of a mistake, it will not invalidate the instrument, *Kershaw v. Cox*, 3 Esp. N. P. C. 246. See also *Knill v. Williams*, 10 East, 431. *Cole v. Parkin*, 12 East, 471. *Bathe v. Taylor*, 15 East, 412. *Downes v. Richardson*, 5 B. & A. 674. *Kennerly v. Nash*, 1 Stark. N. P. C. 452. *Jacobs v. Hart*, 2 Stark. N. P. C. 45. *Brutt v. Picard*, 1 R. & M. N. P. C. 37.]

ledge

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ledge of the holder : but no case has been cited to shew, that an alteration, such as was made in the present instance, would vitiate a written instrument, except it were a deed. But there is a material difference between deeds and bills of exchange. Deeds seldom, if ever, pass through a variety of hands, and are not liable to the same accidents to which bills are, from their negotiability, exposed. There is therefore good reason in the rule which requires that deeds should be strictly kept, and which will not suffer the least alteration in them ; but the same rule is not applicable to bills. In ancient times the Court decided on the inspection of deeds, for which reason a profert was necessary, that they might see whether any rasure or alteration had taken place : but bills of exchange were always within the cognizance of the jury. The form of the issue on a deed also, is different from that on a bill ; in the one it is, that it is not *then, i. e.* at the time of plea pleaded, the deed of the party, 11 Co. 27 a. *Pigot's Case*, but the issue on a bill is, that the Defendant *did* not undertake and promise. Here the jury have expressly found that the Defendant did accept the bill, and the promise arises by implication of law from the acceptance. An alteration in the date, subsequent to the acceptance, will not do away the implied promise. In *Price v. Shute*, " a bill was drawn payable the first of *January* ; the person upon whom it was drawn accepts the bill to be paid the first of *March*, the servant brings back the bill : the master perceiving the enlarged acceptance strikes out the first of *March*, and puts in the first of *January*, and then sends the bill to be paid ; the acceptor then refuses : whereupon the person to whom the monies were to be paid, strikes out the first of *January*, and puts in the first of *March* again. In an action brought on this bill, the question was, whether these alterations did not destroy the bill ? and ruled they did not. 2 *Molloy* 109." (a) In *Nicols v. Haywood*, *Dyer*, 59, it was holden in the case of a bond, that where the seal was destroyed by accident before the trial, the jury might find the special matter, and being after plea pleaded, it could not be assigned for error, but the Plaintiff recovered. To the same point also is *Cro. Eliz.* 120. *Michael v. Stockwith*. So in the present case, it was competent to the jury to find the special matter, and an alteration in the bill subsequent to the time of the acceptance,

(a) [Beawe's Lex Mercat. tit. Bill of Exchange, pl. 222.]

ought not to prevent the Plaintiff from recovering. In Dr. *Leyfield's Case*, 10 Co. 92 b. it is said, "in great and notorious
 " extremities, as by casualty of fire, that all his evidences
 " were burnt in his house, there, if that should appear to the
 " judges, they may, in favour of him who has so great a loss
 " by fire, suffer him upon the general issue to prove the deed
 " in evidence to the jury by witnesses:" the casualty by fire is
 only put as an instance, for the principle is applicable to all
 cases of accident. Thus also in *Read v. Brookman*, 3 Term
Rep. B. R. 151, a deed was pleaded as being lost by time and
 accident, without a profert: and the present case is within the
 reason and spirit of that determination.

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Bearcroft, contra. On principles of law and sound policy, the Plaintiff ought not to recover. The reason of the rule, that a material alteration shall vitiate a deed, is applicable to all written instruments, and particularly to bills of exchange, which are of universal use in the transactions of mankind. And here there was a material alteration in the bill, inasmuch as the time of payment was accelerated. As to the case of *Price v. Shute*, it is but loosely stated, and that not in any book of reports; and it does not appear against whom the action was brought.

Lord Chief Justice EYRE. I cannot bring myself to entertain any doubt on this case, and if the rest of the Court are of the same opinion, it is needless to put the parties to the delay and expence of a second argument. When it is admitted that the alteration of a deed would vitiate it, the point seems to me to be concluded; for by the custom of merchants, a duty arises on bills of exchange from the operation of law, in the same manner as a duty is created on a deed by the act of the parties. With respect to the argument from the negotiability of bills of exchange and their passing through a variety of hands, the inference is directly the reverse of that which was drawn by the counsel for the Plaintiff: there are no witnesses to a bill of exchange, as there are to a deed; a bill is more easily altered than a deed; if therefore courts of justice were not to insist on bills being strictly and faithfully kept, alterations in them highly dangerous might take place, such as the addition of a cypher in a bill for 100*l.*, by which the sum might be changed to 1000*l.* and the holder having failed in attempting to recover the 1000*l.* might afterwards take his chance of recovering the 100*l.*

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as the bill originally stood. But such a proceeding would be intolerable. It was said in the argument that the Defendant could not dispute the finding of the jury, that they had found that he accepted the bill, and therefore that the substance of the issue was proved against him. But the meaning of the plea of *non assumpsit* is, not that he did not accept the bill, but that there was no duty binding on him at the time of the plea pleaded (a). There are many ways by which the obligation of the acceptance might be discharged ; for instance, by payment. And it was certainly competent to him to shew, that the duty which arises *primâ facie* from the acceptance of a bill, was discharged in the present case, by the bill itself being vitiated by the alteration which was made.

Lord Chief Baron MACDONALD. I see no distinction, as to the point in question, between deeds and bills of exchange: and I entirely concur with my Lord Chief Justice, in thinking there would be more dangerous consequences follow, from permitting alterations to be made on bills, than on deeds.

The other Judges declared themselves of the same opinion.

Judgment affirmed.

(a) See *Dougl.* 111 & 112, 8vo. *Sullivan v. Montague*, and the notes there.

Wednesday,
June 5th.

HAMILTON *against* LE GRANGE.

[*In the Exchequer Chamber in Error.*]

See 4 *Term Rep. B. R.* 613.

A memorandum indorsed on a bond, which was conditioned for the payment of 100*l.* by quarterly payments of 5*l.* each, and interest at 5*l.* per cent., "that at the end of each year the year's interest due was to be added to the principal, and then the 20*l.* received in the course of the year was to be deducted, and the balance to remain as principal, and so continue yearly till both principal and interest were fully paid", was not usurious.

THIS was an action of debt on a bond, conditioned for the payment of 100*l.* with interest at 5*l.* per cent. in yearly payments of 20*l.* by four quarterly payments of 5*l.* each, until the whole should be paid. There was also a memorandum indorsed as follows, "That it is the true intent and meaning of the parties, that at the expiration of each and every year, the year's interest due is to be added to the principal sum, and then the 20*l.* received during the course of the year to be deducted, and the balance to remain as principal, and so continue yearly, until both principal and interest be fully paid."

was to be added to the principal, and then the 20*l.* received in the course of the year was to be deducted, and the balance to remain as principal, and so continue yearly till both principal and interest were fully paid", was not usurious.

The

defendant, after oyer of the condition and memorandum, and usury, and obtained a verdict, which the Court of Bench afterwards set aside, being of opinion that the act disclosed was not usurious. (4 *Term Rep. B. R.* 613.) A point of error having been brought on the judgment of that Court, *Reader* now argued on the part of the Plaintiff in error, saying that it was a corrupt and usurious contract, being made with a view to receive more than 5 *per cent.* interest. The interest of the sum of 100*l.* is the only thing which makes any difference in judging of the transaction. But suppose the bond had been given for 10,000*l.* payable by 2000*l.* a year in yearly payments of 500*l.* the usury will then be manifest, [145] according to the terms of the agreement, at the end of the year, the interest is to be added, (which must mean the year's interest on the whole sum, as no other is mentioned,) notwithstanding the several payments of the principal, at the end of the second, and third quarters, for which no allowance is to be made.

Chief Justice EYRE stopped *Gibbs*, who was going to say on the other side, and said, the Court must strain the force of the contract in order to make it usurious: it was not interest on 100*l.* but the interest *due* that was to be added to the principal at the end of the year, and the interest due only be taken to mean what was legally due.

MASON, J. Even admitting the construction contended for, it does not appear to me to be usury, for there was no consideration but the consideration of the bond was the giving up an annuity; the memorandum was part of the agreement, and the annuity upon which the annuity was relinquished.

Judgment affirmed.

ILDERTON *against* ILBERTON.

[*S* was a writ of dower *unde nihil habet*, and the pleadings were as follow,

Northumberland to wit, *Mary*, otherwise *Maria Ilderton*, widow, who was the wife of *Thomas Ilderton*, Esquire, deceased,

(in case of evading the laws of *England*) will intitle the woman to dower in *England*. The issue of such a marriage may be tried by a jury; a replication therefore to a plea of "*ne unquiescit*" in a writ of dower, alleging a marriage in *Scotland*, may conclude to the country: and in replication, it is not necessary to state that the marriage was had in any place in *England*, by way of (a).

(a) [Vide 1 Saund. 8 a (n.) 5th Edit.]

by

1793.

HAMILTON
against
LEGRANGE.

Wednesday,
June 19th.

A marriage
celebrated in
Scotland
(but not be-
tween per-
sons who go
thither for

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 ILDERTON
 against
 ILDERTON.

by *Townley Ward*, her attorney, demands against *Robert Ilderton*, the third part of ten messuages, ten barns, ten stables, four gardens, four orchards, one water corn-mill, 2000 acres of land, 2000 acres of meadow, 2000 acres of pasture, 2000 acres of moor, and 200 acres of woodland, with the appurtenances, in the parish of *Ilderton* in the county of *Northumberland*, as the dower of the said *Mary*, otherwise *Maria*, of the endowment of the said *Thomas Ilderton*, heretofore her husband, whereof she has nothing, &c.

[146] Plea. And the said *Robert Ilderton* by *Henry Barney Mayhew* his attorney comes and says, that the said *Mary*, otherwise *Maria*, ought not to have her dower in this behalf, as having been the wife of the said *Thomas Ilderton* deceased, because he says, that the said *Mary*, otherwise *Maria*, never was accoupled to the said *Thomas Ilderton*, deceased, in lawful matrimony. And this the said *Robert Ilderton* is ready to verify, therefore he prays judgment if the said *Mary*, otherwise *Maria*, ought to have her dower of the messuages and tenements aforesaid, with the appurtenances.

Replication. And the said *Mary*, otherwise *Maria*, by the said *Townley Ward* her attorney aforesaid, says, that she ought not by any thing in the plea of the said *Robert* above alleged, to be barred from having her dower aforesaid, in this behalf, because she says, that she the said *Mary* otherwise *Maria*, on the 6th day of *September*, in the year of our Lord 1774, was accoupled to the said *Thomas Ilderton* deceased, in lawful matrimony, at *Edinburgh*, in that part of Great Britain called Scotland, and this she prays may be enquired of by the country, &c.

Demurrer. And the said *Robert* saith, that the said plea of the said *Mary*, otherwise *Maria*, in manner and form aforesaid above pleaded, by way of reply to the said plea of the said *Robert* by him above pleaded, and the matters therein contained, are not sufficient in law for the said *Mary*, otherwise *Maria*, to have or maintain her said action thereof against him, and that he the said *Robert* is not bound or obliged by the law of the land to make answer thereto, and this he is ready to verify, wherefore, for want of a sufficient replication in this behalf, the said *Robert*, as before, prays judgment, and that the said *Mary*, otherwise *Maria*, may be barred from having her dower aforesaid, in this behalf, and for causes of demurrer in
 law

law in this behalf, the said *Robert*, according to the form of the statute in such case made and provided, specially sets down and shews to the Court here, the causes following, (that is to say) that the said supposed marriage in the replication mentioned, and therein alleged to have been celebrated in that part of *Great Britain* called *Scotland*, is not a marriage whereby, or by reason whereof, the said *Mary*, otherwise *Maria*, can by law claim or intitle herself to any dower of the tenements above mentioned. “And also for that the said *Mary*, “otherwise *Maria*, hath not laid any place by way of venue, “where the said supposed marriage was had.” And also for that the said replication is ill concluded, by being concluded to the country; and for that the said *Mary*, otherwise *Maria*, hath by her said replication and the conclusion thereof, attempted to put in issue, and draw to a trial of the country, a matter which is not by law triable by a jury of the country, “but which is of ecclesiastical cognizance, and which ought to “be tried by the certificate of the bishop, to whom the right of “certifying whether the said *Mary*, otherwise *Maria*, and “*Thomas Ilderton* deceased, were or were not accoupled in “lawful matrimony, belongs. And also for that it does not “appear to the court here, to what bishop, or other spiritual “judge or person, any writ can or ought to be directed or “sent, to inquire and certify whether the said *Mary*, otherwise “*Maria*, was accoupled to the said *Thomas Ilderton* deceased, “in lawful matrimony, or not,” and also for that the said replication is in other respects defective and informal.

Joinder in Demurrer.

This cause was first argued in *Michaelmas* term 1791, by *Le Blanc*, Serjt., for the demandant, and *Cockell*, Serjt., for the tenant; and a second time in *Hilary* term 1792 by *Lawrence*, Serjt., for the demandant, and *Bond*, Serjt., for the tenant: after which, and before any judgment was given, the tenant died. In consequence of this a fresh writ was brought, and the pleadings being altered by the additional assignment of the causes of demurrer, marked with inverted commas (“ ”), a third argument came on in the present term, when *Le Blanc*, Serjt., argued for the demandant, and *Adair*, Serjt., for the tenant.

It was admitted, on these arguments, at the Bar, and assented to by the Bench, that the first cause of demurrer

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could not be maintained, it being taken as an undoubted proposition, that a marriage celebrated in *Scotland* was such a marriage as would intitle the woman to dower in *England* (a). The points, therefore, which were made on the part of the tenant, were two: 1. That the lawfulness of marriage was exclusively the subject of ecclesiastical cognizance, and therefore not to be tried by a jury of the country. 2. That some place within the kingdom of *England* ought to have been laid as a venue in the replication, where the marriage should have been alleged to have been celebrated.

[148] 1. Although the fact of marriage may be tried by the country, yet the lawfulness of it being a matter solely of ecclesiastical jurisdiction can be decided by no other mode than the certificate of the bishop, which is indispensable in the cases of dower and appeal. This principle, which arose from the circumstance of marriage being a sacrament of the Church of *Rome*, is to be found in the earliest authorities in the law. *Bracton* lays it down “cum autem talis proponatur exceptio, “quod dotem habere non debeat, eo quod non fuit tali viro “(per quem petit) matrimonialiter desponsata, vel *legitimo* “*matrimonio copulata*, hujusmodi inquisitio fieri non potest nec “debet in foro seculari, cum sit spirituale; et ideo demande- “tur inquisitio facienda ordinario loci, sicut archiepiscopo, “episcopo, vel aliis privilegiatis, quibus papa hujusmodi con- “cesserit cognitionem,” then follows the form of the writ to the archbishop or bishop, in which it is expressly said, “quoniam hujusmodi causæ cognitio ad forum spectat ecclesi- “asticum, &c.” *Bracton de Actione Dotis* 302 a. Thus also *Fleta lib. 5. c. 28*, “Super contentionem autem desponsationis, “et divortii celebrationem, non poterit justiciarius procedere “in foro seculari; ideoque demandetur inquisitio facienda “archiepiscopo vel episcopo loci, quia hujusmodi causarum “cognitio spectat ad forum ecclesiasticum, quòd convocatis “convocandis, veritatem diligenter inquirant, et inde certi- “ficent justiciariis per literas suas patentes.” So likewise *Britton cap. 107, 108. pp. 252. 255, Exceptiones de concubinage*

(a) But this proposition is quite clear of the question, whether marriages celebrated in *Scotland*, between persons who go thither in order to evade the laws of *England*, be valid in *England*. See the case of *Compton v. Bearcroft* before the delegates,

shortly stated Bull. N.P. 113. 8vo. See also the observations on this subject, contained in a note Co. Litt. by *Hargr. & Butl.* p. 79 b. & 80 b. [See also *Dalrymple v. Dalrymple*, 2 Haggard, 54. *Scrimshire v. Scrimshire*, Id. 395. *Ruding v. Smith*, Id. 376 (s).]

&c.

&c. is to the same effect. Thus too *Glanville* says, “*Si quis*
 “*versus aliquem hæreditatem aliquam tanquam hæres petat, et*
 “*alius ei objiciat quod hæres inde esse non potest eo quod ex*
 “*legitimo matrimonio non sit natus, tunc quidem placitum illud*
 “*in curiâ Domini Regis remanebit, et mandabitur archiepiscopo*
 “*vel episcopo loci, quod de matrimonio ipso cognoscat ; et quod*
 “*inde judicaverit, id Domino Regi, vel ejus justiciariis scire*
 “*faciat,*” *lib. 7. cap. 13.* and then follows the writ to the
 bishop.

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 against
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And this principle is recognized by Lord Coke, *Co. Litt.* 33 a.
 134 a. 4 Co. 29 a. *Bunting v. Lepingwel, Moore*, 169. 2 *Roll.*
Abr. 584, 585. *tit. Trial. Style*, 10. *Betsworth v. Betsworth, Bro.*
Abr. tit. Trial, pl. 16. 2 *Wils.* 122. 127. *Robins v. Crutchley.*
 It being clear therefore that the lawfulness of marriage can
 only be tried by the certificate of an Ecclesiastical Judge,
 though episcopacy has been abolished in *Scotland*, and there-
 fore there can be no certificate where the espousals were cele-
 brated, yet it by no means follows that the trial shall be by the
 country: it ought rather to be by the certificate of the bishop
 in whose diocese the *lands lie*. Although there may be possibly
 no instance in dower, expressly in point, yet in similar cases
 the writ has gone to the bishop of the diocese where the lands
 were situated. Thus in an assise of *Mort d' ancestor* “the
 “tenant pleaded bastardy in the demandant, who said he was
 “*Mulier* and born in another diocese, and prayed a writ to the
 “bishop of that diocese to certify, and yet the writ was awarded
 “to the bishop of the diocese where the action was brought,”
i. e. where the lands lay. 35 *Ass.* 7. *Bro. Abr. tit. Certificate*
d' Evesque, pl. 14. So in a writ *Sur cui in vitâ*, where bastardy
 was pleaded, and a marriage replied in the county of S., the
 writ was awarded to the bishop of E. where the lands were.
Year Book, 7 *Hen.* 5. 7 & 8 *Bro. tit. Trial, pl.* 21. Thus also
 in an assise of *novel disseisin* of lands in the diocese of *Win-*
chester, where the plea of bastardy was set up, and a marriage
 alleged to have been had in *London*, the writ to certify was
 awarded to the bishop of *Winchester*, and not to the bishop of
London. 38 *Ass. pl.* 30. p. 231.

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2. It is a rule of law, that on every fact stated in pleading to
 have happened in a foreign country, a venue must be alleged
 within the realm of *England* for the purpose of trial. *Co. Litt.*
 251. a & b. 2 *Keb.* 315. *Style*, 342. 6 Co. 47. *Dowdale's case*,

1793. *Mostyn v. Fabrigas*, *Cowp.* 176. *per Lord Mansfield*; and undoubtedly *Scotland*, notwithstanding the union, is in this respect a foreign country. The replication therefore is bad in this point of view, and the defect is pointed out by a special demurrer.

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against
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On the part of the demandant, the arguments were as follow.

It is not denied, that the lawfulness of marriage is a matter of ecclesiastical cognizance, but it is manifest that in dower the writ to certify ought to be directed, not to the bishop in whose diocese the lands are situated, but to him in whose diocese the espousals were celebrated.

This plainly appears from the form of the proceedings in the Entries. Thus in *Rast. Entr.* 223 *a. tit. Dower*, to a count in dower the tenant pleads *ne unques accouple*, the demandant replies, that she at C. in the county of C. in the parish church of M. was accoupled to the said R. (her husband) in lawful matrimony, and this she is ready to verify, when and where the Court shall award.

The record goes on, “ And because the conuzance of causes
“ of this kind belongeth to the Ecclesiastical Court, therefore
“ it is commanded W. bishop of C. and L. the diocesan of the
“ said place, that he, convening before him those who ought
“ to be convened, in this behalf, do diligently inquire into the
“ truth of the fact, and what he shall find thereon he shall
“ make appear to our justices at *Westminster* by his letters
“ patent and close.” Then follows the writ to the bishop, reciting the pleadings and issue, and the parish and church where
[150] the espousals are alleged to have been had. So also in *Rast.* 223 *b.* there is a similar entry, though in neither instance is it clearly marked in what county the lands lay. In *Co. Entr.* 180 *b. tit. Dower*, where the demand is of dower in *London*, to a plea of *ne unques accouple*, the replication is, That the demandant at the parish of *St. Hilary* in the county of *Glamorgan* in the diocese of *Llandaff*, was accoupled in lawful matrimony, &c. “ There-
“ fore because the issue must be tried by the bishop of the said
“ place, it is commanded *Francis, Bishop of Llandaff*, the diocesan of the said place, &c.” In *Robinson’s Entr.* 240. the demand is of lands in *Suffolk*, the plea *ne unques accouple*, and the replication, that the demandant at *Wested* in the said county, in the diocese of *Norwich*, was accoupled; “ Therefore *John*,
“ Bishop of *Norwich*, the diocesan of the said place is com-
“ manded:

“ manded”: there the lands and the marriage were in the same diocese, but the replication is particular in specifying the parish and diocese. In *Bro. Ab. tit. Trials*, pl. 114. “ in an appeal “ by a feme of the death of her baron, if the Defendant pleads “ *ne unques accouple* in lawful matrimony, this shall be tried “ where the espousals are alleged, by the certificate of the “ bishop of the place where the espousals are alleged.” To the same point also is *Fitz. Abr.* 220. *Trial*, pl. 85.

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It appears therefore, that the trial ought to be by the certificate of the bishop of the diocese in which the espousals were celebrated: but where it is impossible, as in the present case, that there should be such a certificate, there the marriage may be tried by the country. There are many instances where certain issues ought regularly to be tried by the certificate of a bishop, yet under particular circumstances those issues may be tried by the country. Thus general bastardy is to be tried by the certificate of the bishop; but there are cases, where, if alleged, it shall be tried *per pais*; as in *formedon*, bastardy was alleged in one who was mesne in the conveyance by which the demandant claimed; and because he was dead and not a party to the writ, it was tried *per pais*, and not by the certificate of the bishop. *Bro. Abr. Trial*, pl. 10. So where the bastardy of one who is dead comes in issue, it shall be tried *per pais*, and not by certificate. *id.* pl. 26. The reason of which is thus given 2 *Roll. Abr.* 584. *Trial*, pl. 17. “ If bastardy be alleged in a stranger “ to the writ, it shall be tried by the country, and not by cer- “ tificate, because if it should be tried by the ordinary, it would “ be peremptory to the stranger perpetually, if it were certified “ that he were a bastard,” and pl. 19. If bastardy be alleged in one who is dead, it shall be tried by the country, and not by the ordinary, because the judgment cannot be final. So in the case of infancy, a matter of spiritual cognizance, as bastardy, alleged in the infant, shall be tried *per pais*, 2 *Roll. Abr.* 586. pl. 34. So if the issue on *ne unques accouple* is to be tried between strangers, it shall be tried by the country, *id.* 585. pl. 17. In *quare impedit*, the ability or non-ability of the clerk shall be tried by the ordinary: but if the ordinary refuses a clerk for non-ability, and gives notice to the patron, who does not present another within six months, whereupon the bishop collates, and the patron brings *quare impedit*, and insists that his clerk was able, if the clerk be living, the question whether able or not,

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not, shall be tried by the metropolitan by examination, but *per pais*, if the clerk be dead. *Bro. Abr. Qua. Imp. pl. 102. 2 Roll. Abr. 583. Trial pl. 1. and 2.* So profession is regularly to be tried by the certificate of the ordinary; but if the profession of a third person comes in question, or of one who is dead, it shall be tried by the country. *Hardres, 63.* And so it shall be of monks and other exempts, and if the ordinary returns that he is exempt from his jurisdiction, then it shall be tried by the country. *2 Roll. Abr. 587. pl. 38.* So it is where the persons to certify are interested: thus customs of the city of *London* shall be certified by the mayor and aldermen by the mouth of their recorder; but when the city is itself concerned, such custom shall be tried by the country. *Hob. 86. 2 Roll. Abr. 579. pl. 2.*

With respect to the want of a venue, which is assigned as a cause of demurrer, it is to be observed that fictions of law are invented for the furtherance of justice, and shall never be contradicted so as to defeat that end, though for every other purpose they may be contradicted. The fiction of a venue with a *videlicet*, is barely for a mode of trial; to every other purpose therefore it shall be contradicted, but not for the purpose of saying, the cause shall not be tried. *Mostyn v. Fabrigas, Cowp. 177.* So here it shall not be insisted on for the purpose of preventing a trial.

[152] “ In an action on a policy of assurance, the plaintiff declared, “ that the Defendant undertook that such a ship should sail “ from *Melcombe Regis* in *Dorsetshire* to *Abbeville* in *France*, “ safely, without violence, &c. and alleged that the said ship in “ sailing towards *Abbeville*, that is to say in the river of *Somme* “ in the realm of *France*, was arrested by the *French* king, “ whereupon the parties came to issue, whether the ship was “ so arrested or not: and this issue was tried at *Nisi Prius* before *Wray*, Ch. J., in *London*, and found for Plaintiff; and “ it was moved in arrest of judgment, that this issue, arising “ merely from a place which is out of the realm, could not be “ tried; and if it could be tried, it was said it should be tried “ by a jury from *Melcombe*: but it was answered and resolved, “ that this issue should be tried where the action was brought. “ 6 Co. 47 b. 4 Inst. 142.”

So too in *Pasch. 28 Eliz.* “ In the King’s Bench the case “ was, a charter party by deed indented was made at *Thetford* “ in *Norfolk*, between *Evangelist Constantine* of the one part, “ and

“ and *Hugh Gynne* of the other part, by the which *Constantine*
 “ did covenant with *Gynne*, that a certain ship should sail with
 “ merchandizes of *Gynne* to *Muttrel* in *Spain*, and there should
 “ remain by certain days, upon the breach of which covenant,
 “ *Gynne* brought an action of debt for 500*l.* upon a clause in
 “ the charter, and alleged the breach of the covenant, for that
 “ the ship did not remain at *Muttrel* in *Spain* by so many days,
 “ as were limited by the covenant: whereupon issue was taken,
 “ and tried before Sir *Christopher Wray*, Ch. J. of *England*,
 “ and found for the Plaintiff; and in arrest of judgment it was
 “ shewn, that this issue did arise out of a place totally and
 “ merely in a foreign kingdom, out of the realm, from whence
 “ no jury of twelve men could come, and the trial was in-
 “ sufficient.

“ But it was adjudged by Sir *Christopher Wray*, Sir *Thomas*
 “ *Gawdy*, and the whole Court of *B. R.*, after great delibera-
 “ tion, that the Plaintiff should recover his 500*l.*, besides his
 “ damages and costs, for that the charter party whereon the
 “ action is brought, was made at *Thetford* within the realm,
 “ and the trial being in the same place where the action was
 “ brought, was sufficient. 4 *Inst.* 141, 142. *Co. Litt.* 261 *b.*”

So too when part of the act, especially the original, is done in
England, and part out of the realm, that part which is to be
 performed out of the realm, if issue be taken thereupon, shall
 be tried here by twelve men, and those twelve men shall come
 out of the place where the writ is brought. *Co. Litt.* 261 *b.* In
Bro. Abr. tit. Trials, pl. 93. it is holden, that in divers cases, ju-
 rors shall take cognizance of an act done in another country, as
 of shipping merchandize to *Venice*, or of freighting a foreign
 ship to *Bordeaux* against the statute, and of an alien born be-
 yond sea; those things shall be tried in *England*, and a foreign
 county shall try damages in another county: and the jurors of
 one county shall find the making of a grant of a rent-charge in
 one county, out of lands in another county, and a lease and
 release made in a foreign county shall be tried in the county
 where the land lies, and a retainer of services beyond sea shall
 be tried in *England.* 7 *H.* 7. 8.

So it is said that if an act be to be done all beyond sea, it
 cannot be tried in *England*; but where part is to be done in
England, and part beyond sea, it may be tried in *England.* *Bro.*
Abr. Trials, pl. 154. So where an agreement is at land, and a
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performance at sea, it shall be tried where the agreement is made; and saying *in partibus transmarinis infra parochiam*, is idle. 12 Mod. 34. *Can v. Cary*.

Lord Chief Justice EYRE. This is a proceeding in dower, and to the declaration there is a plea that the demandant was never accoupled to *Thomas Ilderton*, deceased, in lawful matrimony. To this plea there is a replication, which states that the demandant, on the 6th of *September*, in the year of our Lord 1774, was accoupled to *Thomas Ilderton* deceased, in lawful matrimony at *Edinburgh*, in that part of *Great Britain* called *Scotland*, and the replication concludes to the country. To this replication there is a special demurrer. The demurrer states for cause, that the supposed marriage in the replication mentioned, declaring it to have been celebrated in that part of *Great Britain* called *Scotland*, is not a marriage whereby, or by reason whereof, the demandant can by law claim or intitle herself to have any dower of the tenements above mentioned. There is also another cause of demurrer alleged, That the Plaintiff has not laid any place by way of *venue*, where the supposed marriage was had. There is a third cause, That the replication is ill concluded, by being concluded to the country, and by having by that conclusion attempted to put in issue, and draw to a trial by a jury of the country, a matter that is not by law triable by a jury of the country, but which is of ecclesiastical cognizance, and which ought to be tried by the certificate of the bishop, to whom the right of certifying, whether the Plaintiff and *Thomas Ilderton* were or were not accoupled in lawful matrimony, belongs: and also for that it does not appear to the Court, by the said replication, to what bishop, or other spiritual judge or person, any writ can or ought to be directed or sent, to inquire and certify, whether the Plaintiff was accoupled to *Thomas Ilderton* deceased, in lawful matrimony or not; and there is a joinder in demurrer.

[154] Upon the argument, the first cause of demurrer having been abandoned, the residue of these causes resolves itself into two questions, which have been very ably argued at the Bar; and the Court always feel themselves obliged to the Bar, when they will have the goodness to examine questions of this sort, with that diligence which they have used upon the present occasion. The first of these questions is, Whether the Plaintiff ought in this case to have concluded to the country? The second ques-
 tion

tion is, Whether the replication is either informal, or substantially defective, for want of a *venue*? In support of the demurrer, and upon the first question it has been argued, that the matter of this replication is exclusively of ecclesiastical cognizance; and a passage from *Glanville*, book 7. chap. 13 and 14, has been cited in support of these propositions, that in intendment of law, a jury is not competent to decide upon this matter; that there was in this case no necessity for excluding the ecclesiastical jurisdiction; that in cases of bastardy, which it was said are not distinguishable from this case, a writ always goes to the bishop of the diocese where the lands lie, without regard to the place where the espousals were had, or where the birth was; and that the analogy directs how the writ should be directed, where there happens to be no bishop having jurisdiction in the place, where the demandant states herself to have been accoupled in lawful matrimony, and consequently, that in this case the demandant should have prayed a writ to the bishop where the lands lay, and ought not to have concluded to the country.

The passage in *Glanville* is as follows: "Hæres autem legitimus, nullus bastardus, nec aliquis qui ex legitimo matrimonio non est procreatus, esse potest. Verum si quis versus aliquem; hæreditatem aliquam tanquam hæres petat, et alius ei objiciat, quòd hæres inde esse non potest, eo quod ex legitimo matrimonio non sit natus, tunc quidem placitum illud in curiâ Domini Regis remanebit, et mandabitur archiepiscopo vel episcopo loci, quod de matrimonio ipso cognoscat; et quod inde judicaverit, id domino Regi vel ejus justiciariis, scire faciat, et per hoc breve."

Then follows the form of the writ "Rex archiepiscopo salutem, veniens coram me *W.* in curiâ meâ, petiit versus *R.* fratrem suum, quartam partem feodi unius militis in illâ villâ sicut jus suum, et in quo idem *R.* jus non habet, ut *W.* dicit, eo quod ipse bastardus sit, natus ante matrimonium matris ipsorum. Et quoniam ad curiam meam non spectat agnoscere de bastardiâ, eos ad vos mitto, mandans ut in curiâ Christianitatis, inde faciatis, quod ad vos spectat, et cum loquela illa debitum coràm vobis finem sortita fuerit, mihi literis vestris significetis quid inde coram vobis actum fuerit, &c."

Now it must be acknowledged, that the language of these passages very distinctly marks the ground and principle upon which the temporal courts have sent their writs to the bishop, namely,

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namely, that the cognizance of lawful matrimony belongs to the Court Christian, and not to the temporal courts. "*Placitum illud in curiâ Domini Regis remanebit, et mandabitur archiepiscopo vel episcopo loci, quod de matrimonio ipso cognoscat, et quod indè judicaverit, id scire faciat*" are strong words, and the language of the writ, "*quoniam ad curiam meam non spectat agnoscere de bastardiâ, eos ad vos mitto, mandans ut in curiâ Christianitatis inde faciatis quod ad vos spectat; et cum loquela illa debitum coràm vobis finem sortita fuerit, mihi literis vestris significetis, quid indè coram vobis actum fuerit,*" is still stronger to mark the sense of the time in which *Glanville* wrote, that questions of matrimony and bastardy were exclusively of ecclesiastical cognizance, and that a jury was at that time thought to be not competent to decide upon these questions; or at least if they do not go so far, as a jury not being thought competent to the decision of these questions, they shew that the Court itself was not competent to such examination and decision.

It was agreed by my Brother *Adair*, that the matrimony of which the Court Christian has at this day exclusive cognizance, is lawful matrimony, as opposed to marriage in fact, and that it was essential that the marriage should be lawful in two cases only, in the case of dower and in the case of appeal: but it is very obvious that *Glanville*, in the passage which I have read, draws no such line; he supposes that in the case of bastardy, "*mandabitur episcopo, &c. quod de matrimonio ipse cognoscat.*" *Glanville* wrote in the time of *Henry* the Second, at which time the distinction between general and special bastardy had not been introduced. The struggle for legitimating the issue born before matrimony, which is recorded in the statute of *Merton* (a), 20 *Henry* 3. c. 9. seems first to have suggested the plea of special bastardy, and it is observable, and is material, that the Temporal Courts, from that time, withdrew the cognizance of special bastardy from the Court Christian. In succeeding times, other considerations induced the Temporal Courts to withdraw from the cognizance of the Court Christian the questions of matrimony and of bastardy, in a variety of cases. In bastardy, the trial by the certificate of the bishop takes place at this day, only in the case of a general allegation of bastardy, and that only so long as the party is living, and not only living, but a party to the suit, and not only a party to the suit, but adult;

(a) 2 Inst. 96.

in matrimony, as is agreed by my Brother *Adair*, in the two cases only of dower and appeal. It is not therefore to *Glanville* that we must resort for the present state of the law respecting the trial by certificate of the bishop; and when we advert to the ordinary course of proceeding, in every one of those cases which have been withdrawn from the cognizance of the Court Christian, it will be impossible to maintain that, in intendment of law, a jury is not competent to try questions of matrimony or bastardy. The true proposition is, that the common law is general and fundamental, that the particular trials by the Court Christian are to be considered as privileges, and as such in their nature particular, that every thing which is not within the privilege belongs to the common law. Respecting things which have been considered in early times as proper to be tried by the certificate of the bishop, if for good reason they ought not to be so tried, or if from particular circumstances they cannot be so tried, the common law, out of its own inexhaustible fountain of justice, must derive another mode of trial, and that mode is the trial by the country. It was upon these principles that the case of special bastardy, and every one of the other cases which I have alluded to, have been sent by the Temporal Courts to be tried by the country, instead of being tried by the certificate of the bishop; and they will be found applicable to every case in which the law of *England* hath admitted of any special mode of trial; for instance, the trial by inspection, by the escheator, by the certificate of the marshal of the king's host, by the certificate of the recorder of *London*, nay, even the trial by the record, and in short, every other kind of trial that can be stated.

But it has been argued in support of the demurrer, that in this case there is no necessity for departing from the antient and usual course of trial, of an issue joined on the marriage in dower; that this marriage alleged to have taken place in *Edinburgh*, in that part of the united kingdom called *Scotland*, may be tried by the certificate of the bishop of that diocese in which the county where the writ is brought happens to lie. This is not supported by the authority of any case adjudged in point, but it is argued upon the analogy which the present case bears to adjudged cases, and particularly to the case of general bastardy, where the writ to the bishop is said, and I believe truly said, to be always sent to that bishop in whose diocese the lands lie, or, more properly, where the demandant's writ is brought.

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Upon whatever ground it proceeded in bastardy, the writ always went to the bishop of the diocese where the lands lay. Now in the case of dower, if a general replication to a plea of *ne unques accouple in loyal matrimonie* is admissible, there, by analogy to the case of bastardy, it might be argued that the writ should go to the bishop of that diocese where the lands lay, upon a foundation common to both cases, that the birth in wedlock in bastardy, or the lawful marriage in dower, should be intended to have taken place in the county where the lands lay. But as in most of the cases of dower, and probably in all, the replication is special, of espousals in a particular church, in a particular county and diocese, and as the writ to the bishop has usually gone to the bishop of the diocese where the espousals have been alleged to have been celebrated, and as I have been able to find no case, in which the espousals having been alleged to have been celebrated in another county, and in another diocese, the writ has yet gone to the bishop of the diocese where the lands lay, there seems to be no manner of analogy between the case of bastardy and dower. To whatever

[158] bishop the writ in either case is directed, it is sent to him as ordinary, as having either in fact or in the intendment of law, cognizance of the question. The ordinary acts as a judge, in a cause regularly instituted before him: one of the reasons for not sending a writ to the bishop, where a party who is attempted to be bastardized is dead, or a stranger to the suit,

(a) Pl. 20.

is, that the suit in the Court Christian cannot be decided between the parties; it is a false reason to say that it does not go in that case because it is peremptory; it is peremptory because it is the judgment of a Court of competent jurisdiction, in a suit between the parties. If under any circumstances, the writ goes to a bishop within whose diocese the espousals were in fact not celebrated, it is pretty clear that he might decline certifying. In one of the cases that were cited, it was said expressly, that he might return by way of answer to the writ, that the place of the espousals alleged to be within his diocese was not within his diocese, which return could not be admitted if the writ might go to any bishop, in respect of the matter being in its nature of ecclesiastical cognizance. All the analogies of law contradict that notion. In the theory of our law, a jury of one county could not try a matter of fact arising in another county. If we are to resort to analogy, let us consider how the law stands respecting the certificate of the bishop. In the case of profession, the writ went to the bishop of that diocese in which the religious house was situate, upon the presumption that he was the ordinary, and could examine; but if the religious house happened to be exempted, as was frequently the case, this was a sufficient return to the writ, and the trial by certificate could not be had. If a question arises in *quare impedit*, the writ goes to the bishop of the diocese to certify, but if the bishop claims any thing more than as ordinary, so that he may be a disturber, the writ cannot go to him, for he is interested: in that case it does not go to any other bishop, but it goes to his metropolitan. Why? Because he is superior ordinary. Suppose the case then to arise in the diocese of the Archbishop of *Canterbury*, who has no superior ordinary, and he was a disturber, and consequently the writ could not go to him, all the analogies of law exclude the idea of the writ being sent to any inferior ordinary; in that case, therefore, it is evident that in a matter confessedly arising, not only within the kingdom, but even within the diocese where the writ is brought, and where the lands lay, there could be no writ to the bishop. If in all cases in which a writ goes to the bishop, the writ is sent to that bishop who has, or is at least presumed to have, jurisdiction of the subject matter; if it is sent to him as ordinary, and in no other character, and if where it cannot be sent to the ordinary, even within the kingdom, it cannot be sent

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sent to a bishop at all, upon what principle, or upon what analogy of law, can a marriage distinctly stated to have been celebrated out of any diocese, out of any actual or presumed jurisdiction of any ordinary, nay out of the kingdom, be sent to any bishop to be by him inquired into and certified? If the trial cannot be by certificate, we lay it down as a proposition fundamental and incontrovertible, that the trial is to be by the country: and for a reason that is unanswerable, that there may not be a failure of justice. This is not a point to be debated, but they who have the curiosity to enquire what has been done in cases of a similar exigency, may find in Sir *Thomas Hardres's Reports*, 65, several instances collected by him in an argument delivered by him, of cases, in their own nature triable by the bishop's certificate, sent to be tried by the country, upon the particular circumstances of those cases. One of them is taken from the *Year Book 2 Richard 33, & 4.* and it was trespass for taking of goods: the Defendant pleaded a will by which he was constituted executor, and so entitled himself to the goods in question, which had been the testator's. The Plaintiff said, that after the will was made, whereby the Defendant was appointed to be executor, the testator made another will, wherein he appointed the Plaintiff to be his executor; the Defendant pleaded that the Pope, by his bull, had delegated such a one to examine this matter, who had by sentence annulled the will by which the Plaintiff claimed. It was resolved, that because this matter was not triable by the certificate of any bishop of *England*, to whom the Court might write, that therefore some matter must be put in issue triable *per patriam, ne deficiat justitia*.

The second question which arises upon this demurrer, is, whether in point of form or in substance, it was necessary that the Plaintiff should have alleged that the espousals were celebrated in some place, within some county in *England*; in order to a trial by the country, supposing that such is to be the trial in this case? I must conclude that this inserting of a place has been anxiously avoided, considering the circumstances in which this replication has been framed: I suppose from an apprehension, in my judgment unfounded, that the alleging a place within a county, for the purpose of trying here a matter arising in a foreign country, might have assisted the argument in favour of a trial by certificate. The leaving the replication open to this objection, undoubtedly gives great advantage to the

the Defendant, because, if he can maintain that it is the established form of replication, in similar cases, to allege a place within a county in *England*, the want of it will support his demurrer, it being specially assigned for cause, though in truth it be but a mere form, and not at all essential to the real justice of the case: and if it should in the result be found that there is no such established form of replication, the Defendant has still this advantage, that he will be at liberty to insist that the replication is in this respect substantially defective, and that in this respect, therefore, the demurrer will hold. The question of mere form must be decided by the books of entries; but no one entry has been produced, in a case exactly similar, and very few, if any, in cases analogous, that is, where any matter arising in a foreign country is replied. Forms of declarations stating matters arising in a foreign country, or even pleas, are no precedents. Replications stand upon their own ground in this respect; they have reference to the declaration, they maintain the declaration, and they cannot be entirely separated from the declaration, in the way in which a plea in bar may. They may therefore have the assistance of the declaration, as far as concerns the allegation of a place within a county of *England*, for the mere purpose of trial. The cases cited on the part of the Defendant, for another purpose, proving or tending to prove that special espousals or birth in another county should be tried where the writ is brought, and many other cases which are to be found in the books, some of which were also cited, of matter respecting the persons, when pleaded in abatement, being tried where the writ is brought, sufficiently establish that the replication may borrow a place, for the mere purpose of trial, from the declaration, of which I make no other use at present, than to shew that forms of declarations, and of pleas in bar, are no precedents for forms of replications, and I conclude, that this objection to the replication, considered as an objection of form only, and to be supported only, because it is especially assigned for cause of demurrer, is not so maintained as to oblige us upon fair ground of form to say, that this replication is ill. Considered as an objection in substance, I am ready to agree that it is by no means a trivial objection; our books are full of cases upon the subject of *venues*, and the doctrine is very nice and curious. It was anciently the opinion of lawyers, that a jury of one

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one county could not try any matter arising within another county, and a foreign *county* was almost as formidable a thing in point of jurisdiction to try, as a foreign *country*. The place therefore in which every alleged fact was done, was to be shewn upon the pleadings, that it might be known to what county the jury process should go; and if the facts arose in two counties, or *in confinio comitatum*, that the process might go to both counties. The old law too being, that the jury were to come *de vicineto*, there was another necessity created for very great particularity and niceness in laying *venues*. But when, in process of time, masculine sense had so far controlled the former doctrine of *venues*, that in respect of all matters transitory in their nature the Defendants were obliged to lay the *venues* of transactions they alleged in their pleas in the place and county in which the Plaintiff had laid his declaration, and since the statute 4 Ann. (a) has directed that the jury should come *de corpore comitatús*, the law of *venues* will be found to be very substantially altered, and to lie in a very narrow compass; and the distinction between laying no venue at all in a plea, and being obliged to lay the same venue as is to be found in the declaration, will not be a very substantial one. The principle now is, that the place laid in the declaration draws to it the trial of every thing that is transitory, and it should seem that neither forms of pleading, nor ancient rules of pleading established upon a different principle, ought now to prevail (b). I have said that there was a time when a foreign *county* was almost as formidable a difficulty, with respect to mere trial, as a foreign *country*; and in respect of matters arising in the one or in the other, as far as respects the trial merely, there is no difference between them. All matters arising in a foreign country must be considered, for the purpose of trial, as transitory; there can be no reason for preferring the trying them in one county rather than in another. When the old doctrine prevailed, if a matter arose in *Ireland* the judges thought themselves obliged to take the jury *de vicineto* of the borders of the *English* county nearest to *Ireland*; but since that doctrine has been justly exploded, if a Defendant were to plead a matter arising in a foreign country, he would be obliged to lay the same venue as was laid in the declaration, which brings us again to the distinction between being obliged to repeat the

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(a) C. 16. s. 6. (b) [Vide *Neale v. De Garay*, 7 T. R. 247. accord.]

venue,

venue, which is in the declaration, and laying no venue at all, which appears to me, I confess, to be a distinction without a difference. It may be asked, shall we then assume jurisdiction to try matters arising in a foreign country, without even the colour which the fiction of the parish of *St Mary le Bow* in the ward of *Cheap* has so long supplied? Certainly not: of matters arising in a foreign country, pure and unmixed with matters arising in this country, we have no proper original jurisdiction; but of such matters as are merely transitory, and follow the person, we acquire a jurisdiction by the help of that fiction to which I have alluded, and we cannot proceed without it: but if matters arising in a foreign country mix themselves with transactions arising here, or if they become incidents in an action, the cause of which arises here, we have jurisdiction, and according to the case in *12 Mod.* the fiction need not be resorted to at all, and if resorted to, the effect will be not to give jurisdiction; and if a place had been before named, for that part of the transaction which arose here, it would have no effect even as to the trial. In the very infancy of commerce, and in the strictest times, as I collect from a passage in *Brooke, Trial, pl. 93.* the cognizance of matters arising here, was understood to draw to it the cognizance of all matters arising in a foreign country, which were mixed and connected with it, and in these days we should hardly hesitate to affirm that doctrine.

The result is, That there are no precedents to bind the case in point of form, and if there were, the law has been so altered, that they ought not to bind. In point of substance, the question on this marriage in *Scotland* arising incidentally in a suit in dower, of which we have original jurisdiction, is for the purpose of this cause within our jurisdiction, without the assistance of a fiction; and the venue for the mere purpose of trial, being necessarily the venue laid in the declaration, the inserting it in the replication would have been nugatory, and the want of it can do no harm. We are therefore of opinion that the Demandant is entitled to judgment in her favor.

Judgment for the Demandant.

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ILDERTON
against
ILDERTON.

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Wednesday,
June 19th.

FRENCH and HOBSON *against* CAMPBELL.

Bills of exchange were drawn by *A.* in *England* on *B.* in the *East Indies*, payable 60 days after sight, and a bond was entered into, conditioned to be void if the bills should be duly paid in *India*, or come back to *England* duly protested for non-payment, and the amount of them paid by the obligor within a certain time after they should be so returned protested for non-payment. The bills were sent to *India*, but before they arrived, *B.* the drawee had left the country, and his agent there refused to accept them. They were then protested in *India* for non-acceptance, sent back to *England* so protested, and being presented to the drawee here for payment, were protested for non-payment. This was holden to be a substantial performance of the condition of the bond (a).

THIS was an action of debt on three bonds; the first, dated *July* 17, 1776, for 12,104*l.*, the second, *September* 23, in the same year, for 6104*l.*, and the third, on the same 23d of *September*, for 6060*l.* each of which was stated in a separate count.

Plea, *Non sunt facta*. 2. Oyer of the bond in the first count, by which it appeared that the Defendant was jointly and severally bound with Sir *James Cockburn*, Bart. *Henry Douglas*, Esq. and *Lauchlan Maclean*, Esq. Oyer also of the condition, which was as follows:

“Whereas the above-bounden Sir *James Cockburn* hath delivered to the above-named *Andrew French* and *Daniel Hobson*, for value received, a certain set of bills of exchange four in the set, bearing even date herewith, drawn by the said Sir *James Cockburn* on Lieutenant Colonel *Cockburn* in *Bombay*, in the *East Indies*, for twelve thousand one hundred and four and one third star pagodas, payable at sixty days after sight, to the order of the said *Henry Douglas* and Sir *James Cockburn*, and by them indorsed, as also by the said *Lauchlan Maclean* and *Alexander Campbell*, a true copy of one of which said set of bills of exchange is hereunder written; Now the condition of the above-written obligation is such, that if the said set of bills of exchange or any of them shall be duly paid at *Bombay* aforesaid, according to the tenor and true meaning thereof, or if the said set of bills of exchange or any of them shall be returned, and come back to *England*, duly protested for want of payment, (no one of them having been acquitted as aforesaid,) and the said Sir *James Cockburn*, *Henry Douglas*, *Lauchlan Maclean* and *Alexander Campbell*,

(a) [A writ of error was brought to reverse the judgment, in this case, on the second and third counts, on which this Court had given judgment for the Plaintiff, which judgment was reversed by the Court of King's Bench. It was held by the latter Court, that the bills might have been protested in

India for non-payment, and that notwithstanding having been so protested, the bonds were not forfeited. With regard to the first count, the Court held that they could not examine it, there being a separate and independent judgment given upon it, on which no error had been assigned, 6 T. R. 200.

“any

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“ any or either of them, their, any or either of their heirs exe-
 “ cutors or administrators, shall and do well and truly pay or
 “ cause to be paid unto the said *Andrew French* and *Daniel*
 “ *Hobson*, their executors, administrators or assigns, within
 “ *thirty days* next after any of the said set of bills of exchange
 “ *returned with protest duly made for want of payment* thereof;
 “ (no one of them having been acquitted as aforesaid) shall be
 “ produced, or legal notice thereof given to the said *Sir James*
 “ *Cockburn*, *Henry Douglas*, *Lauchlan Maclean*, and *Alex-*
 “ *ander Campbell*, or either of them, their, any or either of
 “ their heirs, executors or administrators, the full amount of
 “ such bills of exchange, as shall be *so returned*, at and after
 “ the rate of ten shillings sterling per pagoda, then the above-
 “ written obligation to be void, else to be and remain in full
 “ force and virtue.” Oyer also of the said copy of one of the
 said set of bills of exchange, written under the said condition
 of the said writing obligatory, in the said first count of the said
 declaration mentioned, which was in the following words:
 “ *London*, the seventeenth *July* 1776, for star pagodas 12104 $\frac{1}{3}$,
 “ at sixty days after sight, pay this second of exchange (first
 “ not paid) to the order of Messrs. *Douglas* and *Cockburn*, at
 “ the house of Messrs. *Mowbray* and *Renton*, in *Madras*,
 “ twelve thousand one hundred and four and one third star
 “ pagodas, value here received, which place to account. To
 “ *Lieutenant Colonel Cockburn* in *Bombay*.” Signed *Ja. Cock-*
burn, indorsed in blank *Douglas* and *Cockburn*, *L. Maclean*,
Alexander Campbell. “ Which said writing obligatory in the
 “ said first count of the said declaration mentioned, and the
 “ condition thereof, and the said copy of one of the said set of
 “ bills of exchange under the said condition written, being
 “ read and heard, the said *Alexander* by leave of the Court,
 “ &c. &c. because he says that the said set of bills of exchange
 “ in the said condition mentioned, were not, nor were any or
 “ or either of them *returned*, nor did the same or any or either
 “ of them *come back to England* duly protested for want of pay-
 “ ment thereof, and this he is ready to verify, wherefore he
 Prays judgment, &c. And for further plea in this behalf, as
 to the said sum of money in the said first count of the said
 Declaration mentioned, the said *Alexander* by like leave,
 &c. &c. because protesting that the said set of bills of ex-
 Change in the said condition mentioned, were not, nor were

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“ or was any or either of them *returned*, nor did the same, or any
 “ or either of them, come back to *England* duly *protested for*
 “ *want of payment* thereof, for plea in this behalf, the said *Alex-*
 “ *ander* saith, that *no one* of the said set of bills of exchange, re-
 “ turned with *protest duly made for want of payment* thereof, was
 “ nor were any of them *produced*, or *legal notice* thereof given to
 “ the said *Sir James Cockburn, Henry Douglas, Lauchlan Mac-*
 “ *leane*, and *Alexander*, or either of them, and this he is ready to
 “ verify, wherefore he prays judgment, &c.” The fourth plea,
 after oyer of the bond in the second count, craved oyer also of
 the condition of that bond, which was as follows: “ Whereas
 “ the above-bounded *Lauchlan Macleane* hath delivered to the
 “ above-named *Andrew French* and *Daniel Hobson*, for value
 “ received, a certain set of bills of exchange, four in the set,
 “ bearing even date herewith, drawn by the said *Lauchlan*
 “ *Macleane* on *John Macpherson, Esq.*; at *Fort St. George*
 “ *Madras*, in the *East Indies*, for star pagodas six thousand
 “ one hundred and four and one third, payable at *sixty days*
 “ *after sight*, to the order of the said *Sir James Cockburn*, and
 “ by him indorsed, as also by the said *Douglas* and *Cockburn*,
 “ and *Alexander Campbell*, a true copy of one of which said set
 “ of bills of exchange is hereunder written. *Now the condi-*
 “ *tion* of the above written obligation is such, that if the said
 “ set of bills of exchange, or any of them, shall be duly paid
 “ at *Fort Saint George* aforesaid, according to the tenor and
 “ true meaning thereof, or if the said set of bills of exchange,
 “ or any of them, shall be *returned* and *come back to England*,
 “ duly *protested for want of payment*, (no one of them having
 “ been acquitted as aforesaid,) and the said *Lauchlan Macleane*,
 “ *Sir James Cockburn, Henry Douglas*, and *Alexander Camp-*
 “ *bell*, any or either of them, their any or either of their heirs
 “ executors or administrators, shall and do well and truly pay,
 “ or cause to be paid, unto the said *Andrew French* and *Daniel*
 “ *Hobson*, their executors, administrators or assigns, within
 “ *thirty days* next after any of the said set of bills of exchange
 “ *returned with protest duly made for the want of payment* there-
 “ of, (no one of them having been acquitted as aforesaid,) shall
 “ be *produced*, or *legal notice* thereof given to the said *Lauch-*
 “ *lan Macleane, Sir Thomas Cockburn, Henry Douglas*, and
 “ *Alexander Campbell*, or either of them, their, any or either of
 “ their heirs, executors or administrators, the full amount of
 “ such

“such bills of exchange, as shall be *so returned*, at and after
 “the rate of ten shillings sterling per pagoda, then the above-
 “written obligation to be void, else to be and remain in full
 “force and virtue.” Oyer also of the said copy of one of the
 said set of bills of exchange, written under the condition of
 the said writing obligatory in the said second count of the said
 declaration mentioned, which was as follows: “*London*, the
 “*23d September 1776*, for star pagodas $6104\frac{1}{3}$, at *sixty days*
 “*sight*, pay this first of exchange to the order of *Sir James*
 “*Cockburn*, six thousand one hundred and four, and one third
 “value of the same; which place to account.” Signed *L. Mac-*
leane; To *John Macpherson* at *Fort St. George, Madras*. In-
 dorsed in blank, *J. Cockburn, Douglas and Cockburn, Alexander*
Campbell; “which said writing obligatory in the said second
 “count of the said declaration mentioned, and the condition
 “thereof, and the said copy of one of the said sets of bills of
 “exchange under the said last mentioned condition written,
 “being read and heard, he the said *Alexander* by like leave,
 “&c. &c. because he says, that the said set of bills of exchange
 “in the said last mentioned condition mentioned, *were not nor*
 “*were any or either of them returned*, nor did the same nor any
 “or either of them *come back to England duly protested for want*
 “*of payment* thereof, and this he is ready to verify, wherefore
 “he prays judgment if the said *Andrew* and *Daniel* ought to
 “have or maintain their aforesaid action thereof in this respect
 “against him, &c.”

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The fifth plea was the same as the third, *mutatis mutandis*.

The sixth and seventh pleas, which related to the bond in the third count, were nearly the same as the fourth and fifth, the only difference between them arising from the sums and dates of a third set of bills of exchange, as a security for which that bond was given.

Replication to the second plea, “That the said set of bills
 “of exchange in the said condition mentioned, after the making
 “of the said writing obligatory in that plea mentioned, were sent
 “over to *Bombay* aforesaid, to *David Scott, Esq.*, as the agent
 “of the said *Andrew* and *Daniel*, in order to be there presented
 “to the said *Lieutenant Colonel Cockburn*, on whom the same
 “were drawn, according to the custom of merchants, and that
 “the said set of bills of exchange, afterwards, to wit, on the *22d*
 “day of *August*, in the year of our Lord 1777, arrived at *Bom-*
 “*bay*”

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“ *bay* aforesaid, and were then and there delivered to the said
 “ *David Scott, Esquire*, as the agent of the said *Andrew* and
 “ *Daniel* as aforesaid; and the said *Andrew* and *Daniel* further
 “ say, that at the time of the arrival of the said set of bills of
 “ exchange at *Bombay* aforesaid, the said *Lieutenant Colonel*
 “ *Cockburn* was not there, but had left that place, and resided
 “ elsewhere, whereupon the said *Lieutenant Colonel Cockburn*
 “ not being at *Bombay* aforesaid, on the same day and year last
 “ aforesaid, at the request of the said *David Scott*, one *James*
 “ *Todd*, a notary public at *Bombay* aforesaid, by lawful autho-
 “ rity duly admitted and sworn, did go to *Robert Taylor*, the
 “ attorney of the said *Lieutenant Colonel Cockburn*, at *Bombay*
 “ aforesaid, lawfully authorized to act for him the said *Lieu-*
 “ *tenant Colonel Cockburn* in that behalf, and did demand ac-
 “ ceptance of one of the said bills, whereunto the said *Robert*
 “ *Taylor* answered, that the said *Lieutenant Colonel Cockburn*,
 “ who then resided at *Tanna*, had determined *not to accept* the
 “ said bills, as he had no advice from the said *Sir James* of the
 “ nature of the exchange, nor the reason of the said draft, and
 “ the said *Robert Taylor* refused to accept the said bills, for and
 “ on the behalf of the said *Lieutenant Colonel Cockburn*, where-
 [167] “ upon the said notary duly *protested* the said bill *for want of*
 “ *acceptance* thereof, according to the usage and custom of
 “ merchants, and the said *Andrew* and *Daniel* aver, that the
 “ said *Colonel Cockburn* was not at *Bombay* aforesaid, at any
 “ time after the arrival of the said set of bills of exchange there
 “ as aforesaid, and before one of the said bills was returned to
 “ *England* as hereafter mentioned, and that the said *Lieutenant*
 “ *Colonel Cockburn* did not give or leave with any person or
 “ persons whatsoever, any order or orders for the acceptance
 “ or payment of the said bills, or any one of them, nor was or
 “ were there any person or persons at or in *Bombay* or *Madras*,
 “ who would either accept or pay the said bills or any one of
 “ them, nor were or was the said bills or any of them *accepted*
 “ *or paid*, wherefore the said bills so protested as aforesaid,
 “ afterwards, to wit, on the 21st day of *May*, in the year of our
 “ Lord 1778, were returned and came back to *England* so duly
 “ *protested*, no one of the said bills having been acquitted; and
 “ this the said *Andrew* and *Daniel* are ready to verify, &c.”

The replication to the third plea was the same, with the addi-
 tion of the following averment, “ And the said *Andrew* and
 “ *Daniel*

“ *Daniel* further say, that one of the said set of bills of exchange, so returned to *England* with protest duly made, in manner and form as above is mentioned, was after such return, to wit, on the 26th day of *May*, in the year of our Lord 1778, at *London* aforesaid, in the parish and ward aforesaid, produced, together with the said protest, to the said *Alexander*, &c.” (the Defendant.)

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The replication to the fourth plea was also the same, except that it stated, that the set of bills, in that plea mentioned, were sent to *Peter Martin*, at *Madras*, as the agent of the Plaintiff, in order to be there presented to *John Macpherson*; that *John Macpherson* had returned to *England*, when the set of bills mentioned in that plea arrived at *Madras*, and averred, “ That the said last mentioned set of bills were, after such return to *England*, to wit, on, &c. at &c. shewn and presented to the said *John Macpherson* for payment thereof; and the said *John Macpherson* was then and there required to pay the same; but that the said *John Macpherson*, at the said time when the said last mentioned bills were so shewn and presented to him as aforesaid, or at any other time, did not pay the said sum of money mentioned in the said bills, or any part thereof, but then and there wholly refused so to do; whereupon the said *Andrew* and *Daniel*, afterwards, to wit, on the said day, &c. at &c. duly caused the said last mentioned bills to be protested for the said non-payment thereof, according to the usage and custom of merchants, no one of the said bills having been acquitted; whereof the said *Alexander* then and there had notice.”

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The replication to the fifth plea, stated that the said set of bills after such return and protest for non-payment, was produced, together with the said protests, to the said *Alexander*.

The replication to the sixth and seventh pleas were similar to the two last above stated.

To the two first replications there was a general demurrer.

To the third there was a rejoinder, “ that after the arrival of the said set of bills of exchange at *Fort St. George, Madras* aforesaid, to wit on the second day of *July*, A. D. 1777, at *Fort St. George, Madras* aforesaid, to wit, at *London* aforesaid, in the parish and ward aforesaid, the said *Peter Martin* in that plea mentioned, caused one of the said set of bills in that plea mentioned, to be presented and shewn to one *James Henry*

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“ *Henry Casamajor*, and one *Charles Oakley*, then and there
 “ being the attornies and agents of the said *John Macpherson*,
 “ for their acceptance thereof, but that the said *James Henry*
 “ *Casamajor* and *Charles Oakley*, so being the attornies and
 “ agents of the said *John Macpherson*, then and there refused,
 “ and each of them did refuse to accept the same, whereupon
 “ the said *Peter Martin*, afterwards, to wit, on the said 2d day
 “ of *July*, A. D. 1777, caused the said bills to be protested for
 “ want of acceptance thereof, which is the same protesting of
 “ the said bills for want of acceptance thereof, as is mentioned
 “ in the said plea of the said *Andrew* and *Daniel*, by them
 “ above pleaded by way of reply, &c.”

The rejoinders to the fourth, fifth, sixth and seventh replications stated in like manner that the several sets of bills were respectively presented to *Casamajor* and *Oakley* for acceptance. which was by them refused, &c.

To these rejoinders there were general demurrers.

This case was argued in *Hilary* Term last, by *Bond*, Serjt., for the Defendant, and *Lawrence*, Serjt., for the Plaintiffs, and a second time in *Easter* Term by *Rooke*, Serjt., for the Defendant, and *Le Blanc*, Serjt., for the Plaintiffs. On the part of the Defendant the arguments were as follow.

[169] The question for the decision of the Court in this case is, whether the matter alleged in the replications to the two special pleas pleaded to the first count in the declaration, to which replications the Defendant has demurred, is such an answer to the pleas as will intitle the Plaintiffs to recover; for though there are demurrers to the rejoinders, yet on those demurrers the same question arises with respect to the bonds stated in the second and third counts, as appears on the former demurrers. That question in substance is, whether, when there is a bond conditioned for the payment of money within thirty days after bills are returned from the *East Indies* protested for *non-payment*, or notice given of their being so returned, such bond is forfeited by a refusal to pay, on the bills being returned protested for *non-acceptance*? It seems impossible to answer this question in the affirmative, unless it can be shewn that a protest for non-payment, and a protest for non-acceptance, are one and the same thing. If there be a clear difference between the two instruments, recognized and adopted by courts of law, then it will follow, that the obligee, in order to recover on the bond, must
 produce

produce a protest for non-payment, and that he cannot satisfy the terms of the obligation, by a protest for non-acceptance. Now it cannot be denied that there is such a difference. A bill protested for non-acceptance may yet be paid at the time when it becomes due. If an indorser of a foreign bill is called upon to pay it, in consequence of its not being accepted, it is the received practice among merchants, that the indorser shall not sue the drawer without producing a protest for non-payment (a), which cannot be made before the time when the bill becomes due. But the most material distinction is, that a protest for non-acceptance may be made immediately on the acceptance being refused, but a protest for non-payment, not before the day of payment arrives; and it is on this distinction that the present case chiefly depends, the bills being drawn at sixty days sight. For if it be possible to put a protest for non-acceptance, and a protest for non-payment on the same footing, and to make the former equivalent to the latter, there is an end of those provisions which the parties concerned in *Indian* remittances anxiously make, in order to induce the holder of the bills to wait till the time of payment in case they are not accepted. In the course of these *Indian* transactions, it frequently happens that the holder sends the bills by one ship, and the drawer his advices by another: now as the drawer is aware that the bills may possibly arrive in *India* before the advices, and that the drawee will probably not accept them without advice, it is usual for the drawer to offer a considerable advantage to the holder, as an inducement for him to keep the bills in *India* till the time of payment, which is commonly sixty days after sight, instead of sending them back protested for non-acceptance: a collateral security is therefore given, to pay so much *per pagoda*, if the bills are returned protested for non-payment. Now if the Court were to say, that the terms of the bonds were complied with, by the bills being returned protested for non-acceptance (b), they would destroy all the advan-

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(a) This was stated to be the practice among merchants, but *quære?*

(b) In this part of the argument, a case of *Stavelly v. Crawford* was cited, tried before Mr. J. Buller at Guildhall, at the Sittings after Trinity Term 1784, on a bond similar to the present, where there were three pleas; two of usury, and the third, that "the

"bill was not returned duly protested for non-payment", and issues joined on those pleas; and the Plaintiff was nonsuited for want of a protest for non-payment. But as that case seemed to turn merely on the form of the issue, and therefore not to be applicable, it is omitted in the statement of the argument.

tage,

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tage, which it was the intent of the parties to give the drawers of the bills, and the obligors of the bonds, namely, a delay of sixty days, during which time the advices that such bills were drawn might arrive in *India*, or effects might be sent. That this was the intent of the parties is manifest beyond a doubt, and there cannot be a safer rule in the construction of a contract, than the intent of the parties contracting. It is also a rule of law, that where there is an obligation with a condition, the condition shall be construed most in favour of the obligor, though a single bond shall be taken strictly against him. *Co. Litt.* 206. 1 *Saund.* 66. And it was said by Mr. Justice *Buller* in *Straton v. Rastall*, 2 *Term Rep. B. R.* 370. “that against a surety, the contract cannot be carried beyond the strict letter of it,” and in the present case the Defendant *Campbell* joined in the bonds as a surety.

On the part of the Plaintiffs the arguments took the following course:—

In this case there are two questions: the first, What was the intention of the parties according to the true construction of the contract; the second, Whether, supposing the terms of it not to have been literally complied with, there has not been a substantial performance of the conditions? With respect to the first question, the facts admitted by the pleadings are these: the Plaintiffs were desirous to remit money to *India*, and in order to make the remittance, they applied to the Defendant and the other obligors, to give them bills of exchange in *England*, payable in *India*, for which they paid a valuable consideration—
[171] and there was an agreement between the parties, that in case the bills were not paid in *India*, the obligors would pay the obligees after a certain rate *per pagoda*, within thirty days after the bills should be returned protested for non-payment. Now this being the nature of the contract, the parties are to be presumed to have entered into it with a knowledge of the general law relating to bills of exchange, which form the basis of it. That law is, that the drawer of a bill of exchange, by the act of drawing it, undertakes, among other things, that the person on whom it is drawn, shall be found at the place where he is described as being, for the purpose of the bill being presented to him, and that he shall accept it when presented. If the bill be not accepted, the holder may immediately sue the drawer, without waiting for the expiration of the time, when it becomes
duc.

due. *Bright v. Purrier*, *Bull. N. P.* 269. *Milford v. Mayor*, *Dougl.* 54.(a). This being the general law on the subject, if in this particular instance any thing more is to be done by the Plaintiffs, than is usually required from the holder of a bill of exchange, it ought to have been stated expressly and unequivocally in the conditions of the bonds, otherwise the Court will not intend that it was the intention of the parties that the holders of the bills in question should do any thing out of the usual course of proceeding. If it had been their intention that the holders should keep the bills sixty days in *India*, such intention ought to have been clearly expressed. The parties are to be considered as using language in its proper signification; when, therefore, they speak of bills being returned duly protested, they must be understood to mean, that the bills should be returned with such protest as the law requires in such cases, which is obviously a protest for non-acceptance. And this will evidently appear on the face of the condition itself, by a fair and easy transposition of the words "for want of payment"; for let those words precede in the sentence the words "duly protested", which they may do without any violence to the construction, and the condition will be "if the bills should be returned for "want of payment, duly protested", &c.

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But secondly, the conditions, if not literally, have at least been substantially performed. It is confessed by the pleadings, that when the first set of bills arrived in *India*, *Colonel Cockburn*, on whom they were drawn, was not at *Bombay*, and his attorney, on being applied to, refused to accept them. The contract therefore, which had been entered into with the drawer, failed in the first instance; the drawee was not found at the place where he was described to be by the bills; and his attorney refused to accept; under these circumstances, the only protest that could be made was made, which was a protest for non-acceptance. With respect to the two other sets of bills, which were drawn upon *Macpherson* at *Madras*, the place also where he was to be found was described in the bills; but when the bills came to *Madras*, he had left *India*, and was returned to *Europe*, and according to the additional fact disclosed in the rejoinder, and admitted by the demurrer, it appears that the holders applied to Messrs. *Oakley* and *Casamajor*, who were the attorneys of *Macpherson* for other purposes, to know whether

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(a) 8vo. edit.

they

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they would accept the bills, which they positively refused. What do the holders do upon this? They protest the bills for non-acceptance, and send them back to *England*, the only place where the person on whom they were drawn was to be found; at that place they are presented to him for payment, having been previously protested for non-acceptance at *Madras*, and he refuses to pay them. So that with respect to the two latter sets of bills, the person on whom they were drawn, not being to be found at the place where he was described to be, and where the drawer, by the terms of his contract, had engaged he should be, and nobody being there who had authority to accept or pay them for him, they are sent after him to the place where he is, and he, on their being presented to him for payment, refuses to pay them; upon which there is a protest for non-payment, and due notice given to the parties, to whom notice was to be given by the conditions of the bonds. Every thing therefore which the holders of the bills could do, has been done, and if the terms of the contract have not been strictly followed, they have been performed *cy-pres*. From the very nature, indeed, of the transaction, it was impossible there should be a protest for non-payment in *India*. The bills are drawn payable sixty days after sight. Now a protest for non-payment cannot be made till the time of payment arrives: in the present case the time of payment could not happen till after sixty days had elapsed from the *sight* of the bills by the drawee: but as they were never *seen* in *India* by the person on whom they were drawn, the sixty days could never begin to run, and consequently the time of payment could never arrive (a): it was impossible therefore to comply with that part of the condition which required a protest for non-payment in *India*. But a bond, with an impossible condition, becomes a single obligation, and the obligee is intitled to recover on it. So if the condition becomes impossible by the act of the obligor. Now here both *Colonel Cockburn* and *Mr. Macpherson* were the correspondents of the obligors, and the conditions of the bonds were rendered impossible by their being respectively absent from the places where the bills described them to be; it is, therefore, *quasi* the act of the obligors themselves which renders the conditions impossible. In *Brooke, Abr. tit. Condition, pl. 127.* four cases are mentioned of conditions becoming impossible, namely,

(a) But *quære* of this?

where

where the impossibility arises from the act of God, of a stranger, of the obligor, and the obligee. The first and last are sufficient to prevent a forfeiture, *actus Dei nemini facit injuriam*, and the obligee cannot take advantage of his own wrong. But in the second case the forfeiture is not prevented, for the obligor has undertaken that he can *rule and govern the stranger*, and in the third his own act shall not excuse it. Here too the obligors undertook that the strangers, *Colonel Cockburn* and *Mr. Macpherson*, should be at the place where they were described to be, and accept the bills.

If then the conditions of these bonds could not be strictly and literally performed, it was sufficient that the performance should be as near as possible to the terms of them. In *Lit. sec. 352.* it is said "If a feoffment be made upon condition
 " that the feoffee shall give the land to the feoffor and to the
 " wife of the feoffor, to have and to hold to them and to the
 " heirs of their two bodies engendered, and for default of such
 " issue, the remainder to the right heirs of the wife; in this
 " case, if the husband dieth, living the wife, before any estate
 " in tail made unto them, &c. then ought the feoffee to make
 " an estate to the wife, *as near the condition*, and also *as near*
 " to the *intent of the condition*, as he may make it: that is to
 " say, to let the land to the wife for term of life, without im-
 " peachment of waste, the remainder after her decease to the
 " heirs of the body of her husband on her begotten (*a*): and
 " for default of such issue, the remainder to the right heirs of
 " the husband." And Lord Coke commenting on this passage
 219 *b.* says, "*A. infeoffs B. upon condition that B. shall make*
 " an estate in frank-marriage to *C.* with one such as is the
 " daughter of the feoffor: in this case, he cannot make an
 " estate in frank-marriage, because the estate must move from
 " the feoffee, and the daughter is not of his blood; but yet he
 " must make an estate to them for their lives, for this is as near
 " the condition as he can. And so it is, if the condition be to
 " make to *A.* (who is a mere layman) an estate in frank-
 " almoigne, yet he must make an estate to him for his life, for
 " the reason here yielded by *Littleton.*" The same doctrine is
 laid down in *Eaton v. Butler*, Sir *W. Jones* 180. *Palm.* 552.
 which was debt by *Richard Eaton* and his wife, who was admi-

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(*a*) See 2 Blac. 731. the observation
 of *Wilmet*, Ch. J., on this passage, and

the note (3) Harg. and Butl. Co. Lit.
 219 *a.*

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nistratrix of *William Butter*, against *Margaret Butter* executrix of *John Butter*, upon an obligation made by the testator; the condition of which was, that if he should happen to die without issue of his body lawfully begotten, that then, if the said *John Butter* by his last will, or otherwise, in writing, should, in his life-time, lawfully assure or convey to the said *William Butter*, his heirs and assigns, certain lands, &c. &c. the obligation to be void, &c. The plea was, that *William Butter* died in the life-time of the obligor, to which there was a demurrer; and after much argument the Court held that the Plaintiff was intitled to recover. The principal question was, whether the obligor was not bound to convey the estate to the heir of *William Butter*; and though all the Court held, that where a condition, possible at the beginning, becomes absolutely impossible by the act of God, the party is discharged, yet *Whitlock* and *Jones* held, that where a condition could not be literally performed, by the act of God, it should be performed as near the intention of the parties as possible; and in the report in *Palmer*, '554. it is stated that three of the judges, in the absence of *Dodderidge*, held that the case of an obligation did not differ in reason from that of a feoffment upon condition, put by *Littleton*; for one was an obligation in *rem*, the other in *personam*.

Upon the whole therefore it is submitted, that the Plaintiffs are intitled to recover.

Cur. advis. vult.

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Lord Chief Justice EYRE. This is an action of debt, brought by the Plaintiff upon three different bonds, in all of which the Defendant was bound, but bound upon different considerations. Upon oyer of the condition of the bond in the first count mentioned in the declaration, the substance of it is, that Sir *James Cockburn* had delivered to the Plaintiffs *French* and *Hobson*, for value received, a set of bills of exchange, bearing even date with the bond, drawn by Sir *James Cockburn* on *Lieutenant Colonel Cockburn* in *Bombay*, for 12104½ star pagodas, payable sixty days after sight, to the order of *Douglas* and Company, and by them indorsed, and also indorsed by *Lauchlan Maclean* and *Alexander Campbell*, which bills are set forth in the condition, but nothing turns upon the form of them. Then the conditions of the bond are, that if these bills of exchange, or any of them, shall be duly paid at *Bombay*,
 according

according to their tenor, or if any of them shall be returned and come back to *England*, duly protested for want of payment, and Sir *James Cockburn*, *Henry Douglas*, *Lauchlan Maclean* and *Alexander Campbell*, or any of them, shall pay to *French* and *Hobson* within thirty days after any of these bills, so returned with protest duly made for want of payment, shall be produced to them, or legal notice given to them, the full amount of such bills of exchange, after the rate of ten shillings sterling per pagoda, then the obligation was to be void, or otherwise to remain in full force. After having thus stated the conditions upon oyer, the Defendant pleads, that the set of bills of exchange in the condition mentioned, were not, nor were any or either of them returned, nor did the same or either of them come back to *England* duly protested for want of payment.

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He pleads also another plea, the substance of which is, that these bills of exchange with protests upon them for non-payment, were never produced, or legal notice given of them to Sir *James Cockburn*, *Henry Douglas*, *Lauchlan Maclean*, and *Alexander Campbell*, or either of them. With respect to the bond in the second count of the declaration, the condition of that bond, as stated upon oyer, is, (after reciting that *Lauchlan Maclean* had delivered to *French* and *Hobson* for value received, another set of bills of exchange, drawn by *Maclean* on *John Macpherson*, Esqr. at *Fort St. George*, *Madras*, in the *East Indies*, for 6104½ pagodas, payable at sixty days after sight, to the order of Sir *James Cockburn*, and by him indorsed, also indorsed by *Douglas* and *Company*), in substance the same as the condition annexed to the former bond, and the pleas are the same. With respect to the third bond, upon oyer, the condition of that bond recites another set of bills of exchange for another sum, drawn by *Lauchlan Maclean* on *John Macpherson* having been delivered to those parties, and is also in substance the same with the condition of the former bond; and the pleas are [176] also in substance the same.

The replication to the first plea, which applies to the first of these bonds, is, that the set of bills mentioned in the condition, were sent over to *Bombay* to *Daniel Scott*, Esq. as the agent of the Plaintiff, in order to be there presented to *Lieutenant Colonel Cockburn*; that this set of bills of exchange arrived in *Bombay*, upon the 22d of *August* in the year 1777, and were there

1798. there delivered to Mr. Scott as the Plaintiff's agent; that at the time of the arrival of these bills, *Colonel Cockburn* was not in *Bombay*, but had left that place, and resided elsewhere; that at the request of the agent Scott, *James Todd* a notary public at *Bombay*, went to *Robert Taylor*, the attorney of *Colonel Cockburn*, and demanded of him acceptance of one of these bills, to which he answered, that *Lieutenant Colonel Cockburn*, who then resided at *Tanna*, had determined not to accept those bills, as he had had no advice from Sir *James Cockburn* of the nature of the exchange, nor the reason of the draft. By the way, I would observe here, that this manner of *stating evidence* in pleadings is extremely irregular and defective pleading, and should be avoided.

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It goes on to state, that this notary public then protested the bills for want of acceptance, according to the usage and custom of merchants; it also states that *Colonel Cockburn* was not at *Bombay* at any time after the arrival of these bills of exchange, and before they were returned to *England*; that *Colonel Cockburn* left no orders with any person whatsoever, for the acceptance or payment, or any persons who would accept or pay the bills, nor were they accepted or paid, and therefore the bills so protested were returned and came back to *England*, no one of them having been acquitted. This therefore is the replication to that plea, which states that the bills of exchange were never returned to *England* protested for non-payment. As to the plea that states, that the parties had never produced or shewn to them the bills returned protested for non-payment, they reply the same matter in substance as in the former replication, with the addition that the bills that had been returned thus protested for non-acceptance, had been produced and shewn to the parties, according, as they insist, to the terms of the condition.

[177] With respect to the plea to the second count of the declaration, they reply, that the bills mentioned in the condition, were sent over to *Madras* to *Peter Martin* the agent of the Plaintiffs, to be presented to Mr. *Macpherson*, on whom the same were drawn; that they arrived at *Fort St. George* on the 2d of *July* 1777, that they were delivered to *Peter Martin* as the Plaintiffs' agent, that at the time of their arrival Mr. *Macpherson* was not at *Fort St. George*, but had left that place, and was returned to *England*, and thereupon Mr. *Macpherson* not being

being at *Fort St. George*, *Peter Martin* caused the bills to be protested for want of acceptance: And the replication goes on to aver, that *Mr. Macpherson* was not at *Fort St. George*, at any time after the arrival of this set of bills, and before they were returned to *England*; and that he did not leave any order or orders for the acceptance or payment of the bills, or any of them; that there was no person at *Fort St. George* who would accept or pay them: that the bills so protested for non acceptance, on the 2d of *May* 1778, came back to *England*, so duly protested, no one of them having been paid. It then goes on to state, and in this respect it differs essentially from the former replication, that these bills, after they were returned to *England*, upon the 18th of *January* 1779, were presented to *Mr. Macpherson* for payment, and that *Mr. Macpherson* was then required to pay them, but that *Mr. Macpherson* did not pay them, or any part of them, but refused so to do; and thereupon, on the 18th of *January* 1779, the Plaintiffs caused these bills to be protested for non-payment, of which the Defendants had notice. They insist therefore, that though these bills were not sent back from *India*, protested for non-payment, yet having been sent back protested for non-acceptance, and then having been here in *England* shewn to *Macpherson*, and payment demanded, which payment was refused, and having been here protested for non-payment, this satisfies the condition, and intitles the Plaintiffs to call for the payment of the money, according to the terms of the condition. They repeat the substance of this replication, in order to meet the case which is pleaded, with respect to their not having notice of the bills having been returned for non-payment.

They then go on to the third count of the declaration; and the replication is, in substance, the same upon the third count, as it is upon the second. There is a demurrer on the part of the Defendant to the first replication, and a frivolous rejoinder to the second and third; and in the end, that rejoinder produces another demurrer, and so the whole question comes before the Court, upon a demurrer joined between those parties upon different parts of the pleadings, and the points that arise upon this demurrer result to these few and simple questions, *viz.* Whether the Plaintiffs have shewn that they have performed the conditions, on their part to be performed, so as to intitle them to call for a performance of the conditions on the

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part of the Defendant, or in failure of that performance, to demand payment; and the case does not lie very wide, but rather in a narrow compass. We agree with those who object, that the Plaintiffs have not in this instance performed their part of the conditions, that these conditions are to be understood according to the true intent of the parties. We agree farther, that if it appears that the condition of a bond is impossible to be performed, the bond becomes a single bond, because the obligation is created, and the party is to obtain a defeasance of that obligation as he may; if he cannot obtain that defeasance, in consequence of the terms of it being originally impossible, the consequence is, that he has entered into a bond, and he has nothing to say against the penalty of it, therefore he must pay it (a). We also agree, that if there be a default in the Defendant, by occasion of which default it is impossible that something, which according to the terms of the condition, is in the order of things precedent, and to be performed on the part of the plaintiff, should be performed, in that case, as it cannot be performed, the performance of it is dispensed with. On the other hand, every possible condition, upon which money is to become payable, must be performed, or must be dispensed with upon sufficient ground, before the money is demandable in an action; and in the action in which it is demanded, it must appear that the condition has been performed, if not literally, at least substantially, or that by reason of some default in the opposite party, the performance of the condition has been prevented, which dispenses with that performance. And to come nearer to the present case, if there is a condition annexed to a writing obligatory, for the benefit of the obligor, and the obligee is by the terms of it to do the first act, or to concur with the obligor in doing the first act, he must do, or concur in doing that first act, before he can demand the penalty. If a stranger is to do the first act, the obligor is to procure that stranger to do it, it being for his benefit; but if the obligee himself is to do it, the obligee cannot demand the penalty till he has done it; it is, with regard to him, in the nature of a condition precedent.

If this wanted authority, there is a case in 2 *Saund.* 106. *Holdipp*, executor of *Dowse*, v. *Otway*, which is a strong authority for a proposition, which in my opinion wants no authority,

(a) [Vide 1 *Saund.* 66. and notes.]

because

because it stands upon plain principles. That was a case in error from the Court of Common Pleas. It was an action of debt on a bill obligatory made by the testator to *Otway* for 68*l.* which he covenanted to pay, as soon as several bills of costs of the testator, expended in the prosecution of suits in law or equity, for *Robert* and *Margery Riggs*, should be duly audited, debated and settled by two attornies, to be indifferently chosen between them, to examine and state the accounts of the bills; one third of which was to be paid by the plaintiff to *Otway*. The Plaintiff protesting that he was always ready on his part to do every thing that was on his part to be performed, and protesting that there was nothing due on any bill of costs, in the prosecution of any suits, averred, that the testator in his life-time, or the Defendant since, had never shewn nor produced any bills of costs expended in the prosecution of the suits aforesaid, to be audited, debated and settled; he therefore concluded that he was well entitled to maintain his action. The judgment was by default. It went into the Court of King's Bench by error, upon another point; that point which we have lately had under consideration here (a), with respect to the power of the Court themselves to assess the damages, with the assent of the Plaintiff. That point was decided against the Plaintiff in error, but in the course of the argument, another objection was taken by *Saunders*, a man who very well understood what he was doing; he objected, that the Plaintiff had not sufficiently intitled himself to his action, for the 68*l.* was not to be paid till the bills of costs were settled by the two attornies; that the averment was nothing to the purpose, for the testator was not bound to produce any bills to any body, but the two attornies: That the Plaintiff ought to have averred, that two attornies were chosen, and that the testator did not produce the bills of costs to them to be settled; or he ought to have averred, that he had appointed one attorney, and had required the testator to appoint another, to examine and settle the bills, which the testator had refused to do, by which it might have appeared that the Plaintiff was in no fault, and that there was a default in the testator: That the money was payable upon the settling of the bill by the two attornies. This did not appear to have been done, nor that there was any default in the testator, by occasion of which it was not done;

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(a) Vide *ante*, vol. i. pp. 252, 528, 541.

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and of this opinion was the whole Court. However they meant to give judgment *nisi*, meaning to consider the question; but *Jones*, who was counsel with the Defendant in error, thinking that he could not maintain the judgment, in order to expedite the cause, that another action might be brought, desired that judgment might be pronounced, reversing the judgment by default in the Court of Common Pleas. The grounds upon which that reversal proceeded are clearly stated; they are very rational, and appear to me to have a direct application to the present case, to establish the grounds upon which our decision now ought to proceed. With regard to the language of the conditions stated in the pleadings, there is no ambiguity in it, nor any doubt as to the intent of the parties. The words are plain, that the money is to be payable here, in the event of the bills being sent back protested for non-payment. A protest for non-payment is perfectly intelligible, and known; and it is undoubtedly a different thing from a protest for non-acceptance; that difference was so clearly demonstrated in the course of the argument, that it is not necessary for me now to point it out. With regard to any supposed difficulty having arisen, which prevented the returning the bills protested for non-payment, it is impossible to make out that there was any difficulty created by any body: and therefore the question, by whom the difficulty was created, does not arise; in truth there was no difficulty at all; it was in the power of the parties, whether the persons upon whom the bills were drawn were resident or not resident, to protest them for non-payment, as much in their power as it was to protest them for non-acceptance: certainly, if it were material, there was no fault in the Defendant, which prevented in any manner the Plaintiffs from protesting these bills for non-payment.

The question therefore is reduced to a single point: Have the Plaintiffs shewn that they have substantially performed the conditions on their part to be performed, before the right to call for the performance of the conditions, on the part of the obligor, or the penalty is to attach? With regard to the bills drawn on *Colonel Cockburn*, which are the bills mentioned in the condition of the bond in the first count in the declaration, there seems to be no colour to argue that they have performed that condition; they have totally failed. The condition called upon them to return these bills protested for non-payment;
 to

to this hour they have not been protested for non-payment, they therefore never could be returned, there never could be notice of their having been returned protested for non-payment, not having been so returned; according to the plain import of the condition, as well as upon the authority of the case which I have cited, they have failed in performing that preliminary act upon which the condition to be performed by the Defendant was to arise, and consequently they cannot be permitted to maintain their action upon that count. With respect to the bonds in the other counts of the declaration, whether the condition on the part of the Plaintiffs has been sufficiently performed, so as to enable them to call upon the Defendants to pay the money stipulated to be paid, or in failure to pay the penalty of the bond, depends upon this, whether we can construe a protest for non-payment, made here after the bills are returned for non-acceptance, to be equivalent to a protest for non-payment there, and the bills returned from thence, with that protest upon them. I at first hesitated with regard to that, because it occurred to me, that it might be very possible, that if the bills had been kept till they were due in *India*, they might have been paid there, that it was a very different thing, whether the payment was to be exacted there, or here, because the bills might have been drawn upon a person, who was only an agent, who, while he remained in *India*, might have effects in his hands, which effects might be liable to the payment of these bills, and which he might be willing to apply to the payment of them, and that when he came home he might leave those effects in the hands of other persons; that he might come home without effects of the drawer in his hands, and be unable to pay here what he might have been willing and able to have paid there, by himself or his agents. But, upon consideration, I think that this would be assuming too much; these facts do not appear upon the record, and I think we can hardly take it for granted that the case was so, so as to establish a substantial difference between the presenting for payment, and the protest for non-payment there, and the presenting for payment and protest for non-payment here. If we were to refine, we might refine to another conclusion, namely, that this whole business is neither more nor less than downright usury. But it is not enough that it has an usurious aspect; the parties have taken other ground, and the facts are stated upon

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upon the record with a view to the ground which they have taken. I agree that upon the whole of the case, it seems reasonable to construe the protest *here*, after personal application to the party, and a demand founded upon that protest *here*, to be a substantial performance of the conditions, by which upon the bills being returned with a protest for non-payment, these parties are bound to pay the money expressed in the conditions, and that not having paid the money, they are consequently liable upon these bonds.

[182] The result of the whole is, that we are of opinion, that with respect to the bond in the first count, the Plaintiffs have not made good their title to demand that money, and that the judgment as to that count ought to be for the Defendant: That with respect to the two other bonds, it appears to us, that the conditions are, though not literally, yet substantially performed; consequently, with respect to the counts upon these two bonds, the judgment will be in favour of the Plaintiffs. The manner of entering these judgments, will depend upon the particular manner in which the demurrers are joined; to which the parties will take care to attend (a).

(a) See this cause in an earlier stage, *ante*, vol. i. p. 245.

RICHARDSON and Another *against* the Mayor and Commonalty of ORFORD.

[*In the Exchequer Chamber in Error.*]

Wednesday,
 June 19th.

See 4 Term Rep. B. R. 437.

To an action of trespass for fishing in the Plaintiffs' fishery, the Defendant pleaded that the *locus in quo* was an arm of the sea, in which

every subject of the realm had the liberty and privilege of free fishing (a). The Plaintiff replied a prescription for the sole and several right of fishing, and traversed that every subject had the liberty and privilege of free fishing in the *locus in quo*. This was a *bad traverse*. The Defendant therefore might well pass it by in the rejoinder, and traverse the prescriptive right of the Plaintiff, stated in the replication.

(a) [Vide *Ward v. Creswell*, Willes, 265.]

fishing

fishing in a certain other *several* fishery of the Plaintiffs in a certain river called *Orford* river, &c. &c. 4. For fishing in a certain other *free* fishery of the Plaintiffs in a certain river called *Orford* river, &c. &c. 5. For taking the fish of the Plaintiffs.

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Plea, Not guilty. 2. That the places and fish in the several counts mentioned were the same, and that the said place in which, &c. “ in the said declaration mentioned, now is, and at “ the said several times when, &c. was, and from time whereof “ the memory of man is not to the contrary, hath been an arm “ of the sea, in which every subject of this realm at the said “ several times when, &c. in the said declaration mentioned, “ had and ought to have had, and yet hath and still ought to “ have, the *liberty and privilege of free fishing*; wherefore the “ said *John* and *William* (the Defendants), being subjects of this “ realm, at the said several times when, &c. in the said declara- “ tion mentioned, fished, &c. &c.” The third plea was the same in all respects as the second, except that it alleged the *locus in quo* to be a public navigable river, in which the tide and water of the sea flowed and reflowed, in which every subject of the realm had a right to fish, &c.

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The first replication, as to so much of the second plea as related to the fishing in the haven in the first count, and the taking, &c. and in the river in the third count of the declaration mentioned, and the taking, &c. &c. (*i. e.* as to the fishing in the Plaintiffs’ *several* fishery) was, “ That the town of *Orford*, in the county of *Suffolk* aforesaid, now is, and from time “ whereof the memory of man is not to the contrary, hath been “ an ancient town, and that the inhabitants of the said town “ now are, and from time whereof the memory of man is not “ to the contrary, have been a body corporate and politic, in “ deed, fact and name, and have at various times for and dur- “ ing the time aforesaid, until the 7th day of *July*, in the 21st “ year of the reign of the Lady *Elizabeth*, late Queen of *Eng- “ land*, been called and known by various names of incorpora- “ tion, to wit, by the name of the honest men of *Orford*, and “ also by the name of the burgesses of the town of *Orford*, and “ since, after the said last-mentioned day, by the name of the “ mayor and commonalty of the borough of *Orford*, to wit, at “ *Orford* aforesaid, in the county aforesaid: and the said mayor “ and commonalty further say, that the said body politic and “ corporate,

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“ corporate, from time whereof the memory of man is not to
 “ the contrary, until and at the said several times when, &c.
 “ in the said first and last count mentioned, have had and en-
 “ joyed, and have used and been accustomed to have and en-
 “ joy, and of right ought to have had and enjoyed, and still of
 “ right ought to have and enjoy, the *sole and several right*, li-
 “ berty and privilege of dredging and fishing for, and catch-
 “ ing and taking oysters in the said place in which, &c. to wit,
 “ at *Orford* aforesaid, in the county aforesaid, *without this, that*
 “ *in the said arm of the sea, in which, &c. every subject of this*
 “ *realm, at the said several times when, &c. had, and ought to*
 “ *have had the liberty and privilege of free fishing, in manner*
 “ *and form as the said John and William have in their said last*
 “ *mentioned plea above alleged;* and this the said mayor and
 “ commonalty are ready to verify,” &c.

[184] The second replication to the residue of the second plea,
 which related to the fishing in the haven in the second count,
 and the taking, &c. and the fishing in the fourth count, and
 the taking, &c. &c. (*i. e.* as to the fishing in the Plaintiffs’ *free*
 fishery) stated the prescription to be, “ That the Plaintiffs have
 “ had and enjoyed, and have used and been accustomed to
 “ have and enjoy, and of right ought to have had and enjoyed,
 “ and still of right ought to have and enjoy, the *free liberty*
 “ *and privilege* of dredging and fishing for, and catching and
 “ taking oysters in the said places in which, &c. every year at
 “ all seasonable times of the year, at their free will and plea-
 “ sure, to wit, at *Orford* aforesaid, in the county aforesaid,” and
 concluded with a traverse precisely the same as the last.

The third and fourth replications, which related to the third
 plea, contained the same matter of inducement as the first and
 second, and each concluded with a similar traverse, of the right
 of every subject of the realm to fish in the *said river, &c.* Then
 followed some new assignments, not material to be stated.

In the first rejoinder “ the said *John* and *William* as to so
 “ much of the said plea of the said mayor and commonalty by
 “ them by way of reply pleaded to the said plea of the said
 “ *John* and *William* by them secondly above pleaded in bar, as
 “ relates to the fishing in the said haven called *Orford* haven, in
 “ the said first count of the said declaration mentioned, and the
 “ fish then and there found and being, catching, seizing, taking
 “ and carrying away, and converting and disposing thereof to
 “ their

“ their own use, and to fishing in the said river called *Orford*
 “ river, otherwise the river *Ore*, in the said third count of the
 “ said declaration mentioned, and the fish then and there found
 “ and being, catching, seizing, taking and carrying away, and
 “ converting and disposing thereof to their own use, and to
 “ seizing and taking the said fish in the said last count of the
 “ said declaration mentioned, and carrying away the same, and
 “ converting and disposing thereof to their own use, say, that
 “ the said mayor and commonalty by reason of any thing in
 “ that plea alleged, ought not to have or maintain their said
 “ action against the said *John* and *William*, because protesting
 “ that the said town of *Orford* is not, nor from time whereof
 “ the memory of man is not to the contrary, hath been an
 “ ancient town; protesting also that the inhabitants of the same
 “ town are not, nor from time whereof the memory of man is
 “ not to the contrary have been a body corporate and politic in
 “ deed fact and name, in manner and form as the said mayor
 “ and commonalty have in their said replication in that behalf
 “ alleged, they the said *John* and *William* as before say, that
 “ the said place in which, &c. in the said declaration men-
 “ tioned, now is, and at the said several times when, &c. was,
 “ and from time whereof the memory of man is not to the
 “ contrary hath been an *arm of the sea*, in which *every subject*
 “ of this realm, at the said several times when, &c. in the said
 “ declaration mentioned, had and ought to have had, and yet
 “ hath, and still ought to have, the liberty and privilege of free
 “ fishing, *without this that the said body politic and corporate,*
 “ *from time whereof the memory of man is not to the contrary,*
 “ *until and at the said several times when, &c. in the said first,*
 “ *third and last counts mentioned, have had and enjoyed, and*
 “ *have been used and accustomed to have and enjoy, and of right*
 “ *ought to have had and enjoyed, and still of right ought to have*
 “ *and enjoy, the sole and several right, liberty and privilege of*
 “ *dredging and fishing for, and catching and taking oysters, in*
 “ *the said place in which, &c. in manner and form as the said*
 “ *mayor and commonalty have in their said replication to such*
 “ *part of the said 2d plea of the said John and William above*
 “ *alleged, and this the said John and William are ready to*
 “ *verify, &c.*”

The other rejoinders were similar, *mutatis mutandis*.

Special demurrer, “For that the said mayor and commonalty
have

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 against
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 in Error.

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against
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have in and by their said plea, so by them above pleaded by way of reply as aforesaid, traversed a material and issuable point of the said plea of the said *John* and *William* so by them above pleaded in bar, and by that traverse tendered to the said *John* and *William* a material issue; but the said *John* and *William* have not, in and by their said plea, so by them thereunto pleaded by way of rejoinder, taken issue upon that traverse, or joined in issue with them the said mayor and commonalty thereupon, but have passed by and taken no notice thereof, and have traversed another part of the said plea of the said mayor and commonalty, so by them above pleaded by way of reply, and have thereby attempted to put in issue another matter, and a matter alleged by the said mayor and commonalty by way of inducement only to the said traverse, so made and taken by the said mayor and commonalty, and have thereby attempted to introduce great uncertainty, confusion and unnecessary length of pleading," &c.

[186] The assignment of errors was, "There is error also in this, " that judgments were given for the said mayor and commonalty " against the said *John* and *William* upon the several demurrers " in the record and proceedings aforesaid, whereas judgments " ought to have been given on those demurrers for the said *John* " and *William* against the said mayor and commonalty, inas- " much as the places in which, &c. being admitted upon the " said record and proceedings to be arms of the sea, or a public " navigable river, in which the tide and water of the sea flowed " and reflowed, the several traverses in the record and proceed- " ings aforesaid, tendered by the said mayor and commonalty, " are traverses of mere inferences of law, and therefore are im- " material traverses; and inasmuch as the traverses in the re- " cord and proceedings tendered by the said *John* and *William* " are traverses of the several prescriptions of the said mayor " and commonalty, whereon alone the title of the said mayor " and commonalty to the fisheries in question, and consequently " to maintain this action depends, and therefore are the only " material traverses to be taken and tendered."

This case was twice argued: the first time in *Easter Term* by *Wood*, for the Plaintiffs in error, and *Chambre* for the Defendants; the second, in the present term by *Bower* for the Plaintiffs, and *Le Blanc*, Serjt., for the Defendants. After which,

Lord Chief Justice *ERNE* said shortly in the name of the Court,

Court, that they had sent this case to a second argument, rather from an unwillingness to adopt, without great deliberation, a decision contrary to that of the Court from whence the record came, than from any difficulty they saw in the question. For from the moment it appeared, that upon the pleadings the Plaintiffs might have recovered a verdict in an action of trespass, without having either possession or right, it seemed very difficult to support the judgment. That the first traverse was of the right of *all* the king's subjects to fish in the arm of the sea, stated by the Defendants; now this was clearly a bad and immaterial traverse, for it was not only a traverse of an inference of law, but it was so taken, that if at the trial it had been proved that it was the separate right of others, and not of the Plaintiffs, the issue must have been found for the Plaintiffs, not only without their being obliged to prove either possession or right, but where in fact they had neither possession nor right. That an immaterial traverse might be passed over, and the matter of the inducement traversed; which had been properly done in this case by the Defendants.

Judgment reversed.

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IN THE HOUSE OF LORDS.

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[In Error.]

GIBSON and JOHNSON *against* HUNTER.

THIS was an action brought by *Hunter*, the Defendant in error, as indorsee, against *Gibson* and *Johnson*, as acceptors of an instrument purporting to be a bill of exchange.

The cause came on to be tried before Lord *Kenyon*, and a special jury, at *Guildhall*, at the Sittings after *Michaelmas* Term 1791, when the Plaintiffs in error demurred to the evidence, and the record was as follows:—

Thomas Gibson, late of *London*, merchant, and *Joseph Johnson*, late of the same place, merchant, were attached to answer *Robert Hunter*, in a plea of trespass on the case, and whereupon the said *Robert Hunter*, by *Edwin Dawes*, his attorney, com-

On a demurrer to circumstantial evidence, the party offering the evidence is not obliged to join in demurrer, unless the party demurring will distinctly admit upon the record every fact and every conclusion, which the evidence offered conduces to prove (a).

which the evidence offered conduces to prove (a).

(a) [See vol. 1. p. 313, and the note there, and 6 R. Parl. Ca. 235. 255. Tomlin's ed. See also *Bulkeley v. Butter*, 2 B. & C. 446.]

plains,

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plains, FOR THAT WHEREAS one *Nathaniel Hingston*, on the 11th day of *March*, in the year of our Lord 1788, to wit, at *Falmouth*, to wit, at *London* aforesaid, in the parish of *St. Mary-le-Bow*, in the ward of *Cheap*, according to the usage and custom of merchants, made his certain bill of exchange in writing, with his own hand and name thereunto subscribed, bearing date the same day and year aforesaid, and directed the said bill of exchange to the said *Thomas Gibson* and *Joseph Johnson*, by the names and description of Messrs. *Gibson* and *Johnson*, bankers, *London*, and thereby required the said *Thomas Gibson* and *Joseph Johnson*, two months after date to pay to Mr. *William Fletcher* or order, 521*l.* 7*s.* value received, with or without advice, he the said *Nathaniel Hingston* then and there well knowing that no such person as *William Fletcher*, in the said bill of exchange mentioned, existed; upon which said bill of exchange, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, at the parish and ward aforesaid, a certain indorsement or writing was made, purporting to be the indorsement of *William Fletcher* named in the said bill, and to be subscribed with his name, and which said indorsement purported to require the said sum of money in the said bill of exchange contained, to be paid to certain persons using trade and commerce as copartners in the copartnership name and firm of *Livesey, Hargreave* and Company, or their order, which said bill of exchange, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, was shewn and presented to the said *Thomas Gibson* and *Joseph Johnson* for their acceptance thereof, and the said *Thomas Gibson* and *Joseph Johnson* then and there, according to the custom of merchants, accepted the same, they the said *Thomas Gibson* and *Joseph Johnson* then and there well knowing that no such person as *William Fletcher*, as in the said bill named, existed, and that the name of *William Fletcher* so indorsed on the said bill of exchange, was not the hand-writing of any person of that name; and the said bill of exchange being so indorsed as aforesaid, they the said persons using trade and commerce in the name and firm of *Livesey, Hargreave* and Company as aforesaid, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, at the parish and ward aforesaid, by a certain indorsement in writing made upon the said bill of exchange, and subscribed with the hand and name of one *Absalom Goodrich*, by procura-
 tion

tion of the said *Livesey, Hargreave* and Company, according to the usage and custom of merchants, appointed the said sum of money in the said bill of exchange contained, to be paid to the said *Robert Hunter*, and then and there delivered the said bill of exchange so indorsed as aforesaid, as well with the name of the said *William Fletcher* as with the name of the said *Absalom Goodrich*, to the said *Robert Hunter*, by reason whereof, and by force of the usage and custom of merchants, the said *Thomas Gibson* and *Joseph Johnson* became liable to pay to the said *Robert Hunter* the said sum of money in the said bill of exchange contained, according to the tenor and effect of the said bill of exchange, and of their acceptance thereof as aforesaid; and being so liable, they the said *Thomas Gibson* and *Joseph Johnson*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, at the parish and ward aforesaid, undertook, and to the said *Robert Hunter* then and there faithfully promised to pay him the said sum of money in the said bill of exchange contained, according to the tenor and effect of the said bill of exchange and their acceptance thereof as aforesaid.

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And whereas also, the said *Nathaniel Hingston* on the said 11th day of *March*, in the year of our Lord 1788, at *Falmouth*, to wit, at *London* aforesaid, at the parish and ward aforesaid, according to the usage and custom of merchants, made his certain other bill of exchange in writing with his proper band and name thereunto subscribed, bearing date the same day and year aforesaid, and then and there directed the said last mentioned bill of exchange to the said *Thomas Gibson* and *Joseph Johnson*, by the name and description of Messrs. *Gibson* and *Johnson*, bankers, *London*, and thereby requested them the said *Thomas Gibson* and *Joseph Johnson* two months after date to pay to Mr. *William Fletcher* or order, 521*l.* 7*s.* value received, with or without advice, and then and there delivered the said last mentioned bill of exchange to the said *William Fletcher*, which said bill of exchange afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, was presented and shewn to the said *Thomas Gibson* and *Joseph Johnson* for their acceptance thereof; and the said *Thomas Gibson* and *Joseph Johnson* then and there, according to the custom of merchants, accepted the same; and the said *William Fletcher* afterwards, to wit, on the same day and year aforesaid, at
London

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London aforesaid, at the parish and ward aforesaid, according to the usage and custom of merchants, indorsed the said last mentioned bill of exchange, and by that indorsement appointed the said sum of money in the said last mentioned bill of exchange, contained, to be paid to the said persons using trade and commerce in the name and firm of *Livesey, Hargreave* and company as aforesaid, or their order, and then and there delivered the said last mentioned bill of exchange so indorsed as aforesaid, to the said *Livesey, Hargreave* and Company; and the said last mentioned bill of exchange being so indorsed as aforesaid, they the said persons using trade and commerce in the name and firm of *Livesey, Hargreave* and Company, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, at the parish and ward aforesaid, by a certain indorsement in writing made upon the said last mentioned bill of exchange, and subscribed with the hand and name of the said *Absalom Goodrich*, by procuration of the said *Livesey, Hargreave* and Company, according to the usage and custom of merchants, appointed the said sum of money in the said last mentioned bill of exchange contained, to be paid to the said *Robert Hunter*, and then and there delivered the same bill of exchange so indorsed as aforesaid to the said *Robert Hunter*, by reason whereof, and by force of the usage and custom of merchants, the said *Thomas Gibson* and *Joseph Johnson* became liable to pay to the said *Robert Hunter* the said sum of money in the said last mentioned bill of exchange contained, according to the tenor and effect of the said last mentioned bill and their acceptance thereof as aforesaid, and being so liable, they the said *Thomas Gibson* and *Joseph Johnson*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and to the said *Robert Hunter* then and there faithfully promised to pay to him the said sum of money in the said last mentioned bill of exchange contained, according to the tenor and effect of the same bill and their acceptance thereof as aforesaid.

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Third count.

AND WHEREAS also, the said *Nathaniel Hingston* on the said 11th day of *March*, in the said year of our Lord, 1788, at *Falmouth*, to wit, at *London* aforesaid, in the parish and ward aforesaid, according to the usage and custom of merchants, made his certain other bill of exchange in writing, the hand
and

and name of him the said *Nathaniel Hingston* being thereunto subscribed, bearing date the same day and year aforesaid, and then and there directed the said last mentioned bill of exchange to the said *Thomas Gibson* and *Joseph Johnson*, by the names and description of Messrs. *Gibson* and *Johnson*, bankers, *London*, and thereby required them the said *Thomas Gibson* and *Joseph Johnson* two months after date to pay to the bearer of the said last mentioned bill 52*l.* 7*s.* value received, with or without advice, which said last mentioned bill of exchange afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, was presented and shewn to the said *Thomas Gibson* and *Joseph Johnson* for their acceptance thereof, who thereupon then and there duly accepted the same, according to the usage and custom of merchants aforesaid: and the said *Robert Hunter* in fact says, that afterwards, and before any payment of the said last mentioned bill of exchange, to wit, on the same day and year aforesaid, at *London* aforesaid, at the parish and ward aforesaid, he the said *Robert Hunter* became and was the bearer and owner of the said last mentioned bill of exchange, of which said last mentioned premises the said *Thomas Gibson* and *Joseph Johnson* then and there had notice, by reason whereof, and according to the usage and custom of merchants, the said *Thomas Gibson* and *Joseph Johnson* became liable to pay to the said *Robert Hunter* the said sum of money in the said last mentioned bill of exchange specified, according to the tenor and effect of the same bill; and being so liable, they the said *Thomas Gibson* and *Joseph Johnson* in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, at the parish and ward aforesaid, undertook, and to the said *Robert Hunter* then and there faithfully promised to pay to him the said sum of money in the said last mentioned bill of exchange specified, according to the tenor and effect of the same last mentioned bill of exchange.

And whereas also, the said *Nathaniel Hingston* afterwards, to wit, on the same day and year aforesaid, at *Falmouth*, to wit, at *London* aforesaid, at the parish and ward aforesaid, according to the usage and custom of merchants, made his certain other bill of exchange in writing, the hand and name of him the said *Nathaniel Hingston* being thereunto subscribed, bearing date the same day and year aforesaid, and then and there directed

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count.

1793. directed the said last mentioned bill of exchange to the said *Thomas Gibson* and *Joseph Johnson*, by the names and description of Messrs. *Gibson* and *Johnson*, bankers, *London*, and thereby required the said *Thomas Gibson* and *Joseph Johnson*, two months after date, to pay to Mr. *William Fletcher*, or order, 521*l.* 7*s.* value received, with or without advice, which said last mentioned bill of exchange afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, was presented and shewn to the said *Thomas Gibson* and *Joseph Johnson* for their acceptance thereof, who then and there duly accepted the same, according to the usage and custom of merchants. And the said *Robert Hunter* avers, that when the said last mentioned bill of exchange was so made as aforesaid, or at any time afterwards, there was not any such person as *William Fletcher*, the supposed payee named in the said last mentioned bill of exchange, but that the same name was merely fictitious, to wit, at *London* aforesaid, at the parish and ward aforesaid, by reason whereof and according to the usage and custom of merchants aforesaid, the said sum of money mentioned in the said last mentioned bill of exchange, became and was payable to the bearer thereof, according to the effect and meaning of the said last mentioned bill; and the said *Robert Hunter* also avers, that he the said *Robert Hunter* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, at the parish and ward aforesaid, in due form of law became and was the bearer and proprietor of the said last mentioned bill of exchange, by reason whereof, and according to the usage and custom of merchants, they, the said *Thomas Gibson* and *Joseph Johnson*, there and then became and were liable to pay to the said *Robert Hunter* the said sum of money, in the last mentioned bill of exchange specified, according to the tenor and effect thereof; and being so liable, they, the said *Thomas Gibson* and *Joseph Johnson*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, at the parish and ward aforesaid, undertook and to the said *Robert Hunter* then and there faithfully promised to pay him the said sum of money in the said last mentioned bill of exchange specified, according to the tenor and effect of the same bill.

[192] Fifth count. And whereas also, the said persons using trade and commerce in the name and firm of *Livesey, Hargreave* and Company,

pany, on the said 11th day of *March*, in the said year of our Lord, 1788, at *Falmouth*, to wit, at *London* aforesaid, at the parish and ward aforesaid, according to the usage and custom of merchants, made their certain other bill of exchange in writing, with the hand and name of the said *Absalom Goodrich*, by procuration of the said *Livesey, Hargreave* and Company, thereunto subscribed, bearing date the same day and year aforesaid, and then and there directed the said last mentioned bill of exchange to the said *Thomas Gibson* and *Joseph Johnson*, by the names and description of Messrs. *Gibson* and *Johnson*, bankers, *London*, and thereby requested them, the said *Thomas Gibson* and *Joseph Johnson*, two months after date to pay to the said *Robert Hunter*, or order, 52*l.* 7*s.* value received, with or without advice, which said bill of exchange afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, at the parish and ward aforesaid, was shewn and presented to the said *Thomas Gibson* and *Joseph Johnson* for their acceptance thereof, and the said *Thomas Gibson* and *Joseph Johnson* then and there, according to the usage and custom of merchants, accepted the same, and the said persons, using trade and commerce in the name and firm of *Livesey, Hargreave* and Company, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, at the parish and ward aforesaid, delivered the said last mentioned bill of exchange to the said *Robert Hunter*, by reason whereof, and by force of the usage and custom of merchants, the said *Thomas Gibson* and *Joseph Johnson* then and there became liable to pay to the said *Robert Hunter* the said sum of money in the said last mentioned bill of exchange contained, according to the tenor and effect of the said last mentioned bill of exchange; and being so liable, they, the said *Thomas Gibson* and *Joseph Johnson*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, at the parish and ward aforesaid, undertook, and to the said *Robert Hunter* then and there faithfully promised to pay him the said sum of money, in the said last mentioned bill of exchange contained, according to the tenor and effect of the said last mentioned bill of exchange.

And whereas also, before and at the time of making the promise and undertaking of the said *Thomas Gibson* and *Joseph Johnson*, next hereinafter mentioned, to wit, on the said 11th day of *March*, in the said year of our Lord 1788, at *Lon-*

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Sixth count.

don aforesaid, at the parish and ward aforesaid, the said *Nathaniel Hingston* was indebted to the said *Robert Hunter* in a large sum of money, to wit, in the sum of 521*l.* 7*s.* of lawful money of *Great Britain*, for money by the said *Nathaniel Hingston* before that time had and received, to and for the use of the said *Robert Hunter*, and for money before that time paid, laid out, and expended by the said *Robert Hunter*, to and for the use of the said *Nathaniel Hingston*, at his special instance and request; and the said last mentioned sum of money, at the time of making the promise and undertaking next hereinafter mentioned, being wholly due and owing, and unpaid from the said *Nathaniel Hingston* to the said *Robert Hunter*, the said *Thomas Gibson* and *Joseph Johnson* afterwards, to wit, on the same day and year last mentioned, at *London* aforesaid, at the parish and ward aforesaid, in consideration of the last mentioned premises, and also in consideration that the said *Robert Hunter*, at the special instance and request of the said *Thomas Gibson* and *Joseph Johnson*, would forbear and give day of payment of the said last mentioned sum of money until the 14th day of *May*, in the said year of our Lord 1788, and would not sue or prosecute the said *Nathaniel Hingston* for the recovery of the said last mentioned sum of money, at any time before default should be made by the said *Thomas Gibson* and *Joseph Johnson* in payment of the said last mentioned sum of money, according to their promise and undertaking, next hereinafter mentioned, undertook, and to the said *Robert Hunter* then and there faithfully promised to pay him the said last mentioned sum of 521*l.* 7*s.* on the 14th day of *May*, in the said year of our Lord 1788: and the said *Robert Hunter* in fact says, that he the said *Robert Hunter*, confiding in the said last mentioned promise and undertaking of the said *Thomas Gibson* and *Joseph Johnson*, did forbear and give day of payment of the said last mentioned sum of money, until the said 14th day of *May*, in the year of our Lord 1788 aforesaid, and did not sue or prosecute the said *Nathaniel Hingston* for the recovery of the said last mentioned sum of money, or any part thereof, at any time before the said *Thomas Gibson* and *Joseph Johnson* had made default in paying the said last mentioned sum of money, according to their said last mentioned promise and undertaking; neither hath the said *Robert Hunter*, at any time since the making of the said last mentioned promise and undertaking

taking of the said *Thomas Gibson* and *Joseph Johnson*, sued or prosecuted the said *Nathaniel Hingston* for the recovery of the same sum of money, or any part thereof, but hath wholly forborne so to do, and the said last mentioned sum of money remains wholly due and unpaid to the said *Robert Hunter*, whereof the said *Thomas Gibson* and *Joseph Johnson* afterwards, to wit, on the 15th day of *May*, in the year last aforesaid, at *London* aforesaid, at the parish and ward aforesaid, had notice.

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And whereas also, before and at the time of making the promise and undertaking of the said *Thomas Gibson* and *Joseph Johnson* next hereinafter mentioned, to wit, on the said 11th day of *March*, in the said year of our Lord 1788, at *London* aforesaid, at the parish and ward aforesaid, the said *Nathaniel Hingston* was indebted to the said *Robert Hunter* in another large sum of money, to wit, in the sum of other 521l. 7s. of like lawful money, for money by the said *Nathaniel Hingston* before that time had and received, to and for the use of the said *Robert Hunter*, and for money before that time paid, laid out, and expended by the said *Robert Hunter*, to and for the use of the said *Nathaniel Hingston*, at his like instance and request; and the said last mentioned sum of money, at the time of making the promise and undertaking next hereinafter mentioned, being wholly due, and owing, and unpaid, from the said *Nathaniel Hingston* to the said *Robert Hunter*, the said *Thomas Gibson* and *Joseph Johnson* afterwards, to wit, on the same day and year last aforesaid, at *London* aforesaid, in the parish and ward aforesaid, in consideration of the last mentioned premises, and also in consideration of the said *Robert Hunter*, at the special instance and request of the said *Thomas Gibson* and *Joseph Johnson*, would forbear and give day of payment of the said last mentioned sum of money, until the 14th day of *May*, in the year of our Lord 1788, and would not sue or prosecute the said *Nathaniel Hingston* for the recovery of the said last mentioned sum of money, at any time before default should be made by the said *Thomas Gibson* and *Joseph Johnson* in paying the said last mentioned sum of money, according to their promise and undertaking next hereinafter mentioned, undertook, and to the said *Robert Hunter* then and there faithfully promised to pay him the said last mentioned sum of money, on the said 14th day of *May*, in the said year of our Lord 1788, if the said last mentioned sum of money

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count.

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should then remain unpaid to the said *Robert Hunter* : and the said *Robert Hunter* in fact says, that he the said *Robert Hunter*, confiding in the said last mentioned promise and undertaking of the said *Thomas Gibson* and *Joseph Johnson*, did forbear and give day of payment of the said last mentioned sum of money, until the said 14th day of *May*, in the year of our Lord 1788 aforesaid, and did not sue or prosecute the said *Nathaniel Hingston* for the recovery of the said last mentioned sum of money, or any part thereof, at any time before the said *Thomas Gibson* and *Joseph Johnson* had made default in paying the same sum of money, according to their said last mentioned promise and undertaking : neither hath the said *Robert Hunter*, at any time since the making of the said last mentioned promise and undertaking of the said *Thomas Gibson* and *Joseph Johnson*, sued or prosecuted the said *Nathaniel Hingston* for the recovery of the same sum of money, or any part thereof, but hath wholly forborne so to do ; and the said last mentioned sum of money, on and after the said 14th day of *May*, in the year of our Lord 1788, remained, and was, and still remains, and is wholly due and unpaid to the said *Robert Hunter*, of all which premises the said *Thomas Gibson* and *Joseph Johnson*, afterwards, to wit, on the 15th day of *May*, in the year of our Lord 1788, at *London* aforesaid, at the parish and ward aforesaid, had notice.

Eighth
 count.

And whereas also, before and at the time of making the promise and undertaking of the said *Thomas Gibson* and *Joseph Johnson* next hereinafter mentioned, to wit, on the said 11th day of *March*, in the said year of our Lord 1788, at *London* aforesaid, at the parish and ward aforesaid, the said persons using trade and commerce in the name and firm of *Livesey, Hargreave* and Company were indebted to the said *Robert Hunter* in another large sum of money, to wit, in the sum of other 521*l.* 7*s.* of like lawful money, for so much money by the said persons using trade and commerce in the name and firm of *Livesey, Hargreave* and Company, before that time had and received to and for the use of the said *Robert Hunter*, and the said last mentioned sum of money, at the time of making the promise and undertaking next hereinafter mentioned, being wholly due and unpaid from the said persons so using trade and commerce in the name and firm of *Livesey, Hargreave* and Company as aforesaid, to the said *Robert Hunter*,

Hunter, the said *Thomas Gibson* and *Joseph Johnson* afterwards, to wit, on the same day and year last mentioned, at *London* aforesaid, at the parish and ward aforesaid, in consideration of the last mentioned premises, and also in *consideration that the said *Robert Hunter*, at the special instance and request of the said *Thomas Gibson* and *Joseph Johnson*, would forbear and give day of payment of the said last mentioned sum of money until the 14th day of *May*, in the said year of our Lord 1788, and would not sue or prosecute the said persons so using trade and commerce in the name and firm of *Livesey, Hargreave* and Company as aforesaid, for the recovery of the last mentioned sum of money, at any time before default should be made by the said *Thomas Gibson* and *Joseph Johnson*, in payment of the said sum of money, according to their promise and undertaking next hereinafter mentioned, undertook, and to the said *Robert Hunter* then and there faithfully promised to pay him the said last mentioned sum of 521*l.* 7*s.* on the said 14th day of *May*, in the said year of our Lord 1788; and the said *Robert Hunter*, in fact says, that he the said *Robert Hunter*, confiding in the said last mentioned promise and undertaking of the said *Thomas Gibson* and *Joseph Johnson*, did forbear and give day of payment of the said last mentioned sum of money until the said 14th day of *May*, in the year of our Lord 1788 aforesaid, and did not sue or prosecute the said persons so using trade and commerce in the name and firm of *Livesey, Hargreave* and Company as aforesaid, for the recovery of the last mentioned sum of money, or any part thereof, at any time before the said *Thomas Gibson* and *Joseph Johnson* had made default in payment of the said last mentioned sum of money, according to their said last mentioned promise and undertaking, neither hath the said *Robert Hunter* at any time since the making of the said last mentioned promise and undertaking of the said *Thomas Gibson* and *Joseph Johnson*, sued or prosecuted the said persons so using trade and commerce in the name and firm of *Livesey, Hargreave* and Company as aforesaid, or any of them, for the recovery of the said last mentioned sum of money, or any part thereof, whereof the said *Thomas Gibson* and *Joseph Johnson* afterwards, to wit, on the 15th day of *May*, in the year last aforesaid, at *London* aforesaid, in the parish and ward aforesaid had notice.

And whereas also, before and at the time of making the
promise

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Ninth count.

1793. *promise and undertaking of the said Thomas Gibson and Joseph Johnson next hereinafter mentioned, to wit, on the said 11th day of March, in the said year of our Lord 1788, at London aforesaid, in the parish and ward aforesaid, the said persons so using trade and commerce in the name and firm of Livesey, Hargreave and Company as aforesaid, were indebted to the said Robert Hunter in another large sum of money, to wit, in the sum of other 521*l.* 7*s.* of like lawful money, for so much money by the said persons so using trade and commerce in the name and firm of Livesey, Hargreave and Company as aforesaid, before that time had and received, to and for the use of the said Robert Hunter, and the said last mentioned sum of money, at the time of making the promise and undertaking next hereinafter mentioned, being wholly due and owing, and unpaid from the said persons so using trade and commerce in the name and firm of Livesey, Hargreave and Company as aforesaid, to the said Robert Hunter, the said Thomas Gibson and Joseph Johnson, afterwards, to wit, on the same day and year last aforesaid, at London aforesaid, in the parish and ward aforesaid, in consideration of the last mentioned premises, and also in consideration that the said Robert Hunter, at the special instance and request of the said Thomas Gibson and Joseph Johnson, would forbear and give day of payment of the said last mentioned sum of money until the 14th day of May, in the said year of our Lord 1788, and would not sue or prosecute the said persons using trade and commerce in the name and firm of Livesey, Hargreave and Company as aforesaid, for the recovery of the said last mentioned sum of money, at any time before default should be made by the said Thomas Gibson and Joseph Johnson in payment of the said sum of money, according to their promise and undertaking next hereinafter mentioned, undertook, and to the said Robert Hunter then and there faithfully promised to pay to him the said last mentioned sum of money on the said 11th day of May, in the said year of our Lord 1788, if the said last mentioned sum of money should then remain unpaid to the said Robert Hunter; and the said Robert Hunter in fact says, that he the said Robert Hunter, confiding in the said last mentioned promise and undertaking of the said Thomas Gibson and Joseph Johnson, did forbear and give day of payment of the said last mentioned sum of money until the said 14th day of May, in the year of our Lord*

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1788 aforesaid, and did not sue or prosecute the said persons so using trade and commerce in the name and firm of *Livesey, Hargreave* and Company as aforesaid, for the recovery of the said last mentioned sum of money, or any part thereof, at any time before the said *Thomas Gibson* and *Joseph Johnson* had made default in payment of the said sum of money, according to their said last mentioned promise and undertaking, neither hath the said *Robert Hunter* at any time since the making of the said last mentioned promise and undertaking of the said *Thomas Gibson* and *Joseph Johnson*, sued or prosecuted the said persons so using trade and commerce in the name and firm of *Livesey, Hargreave* and Company as aforesaid, for the recovery of the same sum of money or any part thereof, but hath wholly forborne so to do; and the said last mentioned sum of money, on and after the said 14th day of *May*, in the year of our Lord 1788, remained, and was and still remains and is wholly unpaid to the said *Robert Hunter*, of all which premises the said *Thomas Gibson* and *Joseph Johnson* afterwards, to wit, on the 15th day of *May*, in the said year of our Lord 1788, at *London* aforesaid, at the parish and ward aforesaid, had notice.

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There were also the four common money counts, viz. the 10th for money had and received, 11th for money paid, 12th for money lent and advanced, and the 13th on an account stated. Plea the general issue.

“ And the jurors of the jury, whereof mention is within made, being called, likewise come, and being chosen, tried and sworn, to say the truth of the premises within contained, the said *Robert Hunter* produced to the jury aforesaid, a certain instrument in writing, in the words and figures following (that is to say):

“ £521 7s.

“ *Falmouth*, 11th *March*, 1788.

“ Two months after date, pay to Mr. *Will. Fletcher*, or order, five hundred twenty-one pounds seven shillings, value received, with or without advice.

“ *Nathl. Hingston*.

“ No. 2068.

“ To Messrs. *Gibson & Johnson*,

“ Bankers, *London*.

“ *G. & J.*

“ And whereupon are the following indorsements, ‘ *William Fletcher*,’

1793. *Fletcher*, 'by proⁿ. of *Livesey, Hargreave and Co.* ' *A. Goodrich*.' And the said *Robert Hunter*, to prove and maintain the issue within joined on his part, shews in evidence to the jury aforesaid, by *Robert Booth* a witness duly sworn in that behalf, that he, the said *Robert Booth*, was a clerk to certain persons using trade and commerce as copartners, in the copartnership name and firm of *Livesey, Hargreave and Company*, and that one *Nathaniel Hingston* was, at the time of the drawing of the said instrument, a shopkeeper, and carried on the business of a shopkeeper, at *Falmouth*, in the county of *Cornwall*: that the name of *Nathaniel Hingston* subscribed to the said instrument, was the hand-writing of the said *Nathaniel Hingston*, and that he drew the same as agent to the said *Livesey, Hargreave and Company*; that *Livesey, Hargreave and Company* used to send down to the said *Nathaniel Hingston* blank bills of exchange for him to sign as the drawer thereof: that many such blank bills were sent down together: that when they were returned to the said *Livesey, Hargreave and Company*, they filled up the blanks with the sum to be paid, and the name of the person to whom the same was to be payable: that when the bills were so drawn and filled up, they were carried indiscriminately with other bills, to the house of *Thomas Gibson and Joseph Johnson*, the Defendants, for their acceptance: that *Livesey, Hargreave and Company*, gave *Gibson and Johnson* advice of the bills so drawn by the said *Nathaniel Hingston*: that such bills, indiscriminately with the said other bills, used to be carried two or three times a day from the house of *Livesey, Hargreave and Company*, to the house of *Gibson and Johnson* for acceptance, and were often carried wet: that the acceptance of the bill produced was the acceptance of the Defendants *Thomas Gibson and Joseph Johnson*: that the said *Robert Booth*, upon those occasions, used to see the Defendant *Johnson*: that *Livesey, Hargreave and Company*, were generally indebted to the Defendants, *Gibson and Johnson*, upon the balance of accounts, for cash advanced by the said *Gibson and Johnson* to the said *Livesey, Hargreave and Company*: that the Defendants, *Gibson and Johnson*, were covered for these acceptances by bills of exchange given as a security for the same, but that the said bills so given as a security have not been paid: that no such person as *William Fletcher*, in the said instrument and indorsement named, existed; and that the name

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William Fletcher, so indorsed on the said instrument, was not the hand-writing of any person of the name of *William Fletcher*. And the said *Robert Hunter* further shews in evidence to the jury aforesaid, by one *Stephen Barber*, a witness duly sworn in that behalf, that he negotiated the instrument now produced, with the Plaintiff *Robert Hunter*; that he carried it from *Livesey, Hargreave* and Company, to get it discounted for them; and that he told the said *Robert Hunter* from whom he came; that the said *Robert Hunter* gave him the value for the said instrument in money, and he took it back to be indorsed by *Livesey, Hargreave* and Company; and that it was indorsed by *Absalom Goodrich*, by procuration of *Livesey, Hargreave* and Company; that the said instrument had been accepted by *Gibson* and *Johnson* before it was carried to be discounted. And the said *Thomas Gibson* and *Joseph Johnson* say, that the aforesaid matters, to the jurors aforesaid, in form aforesaid shewn in evidence by the said *Robert Hunter*, are not sufficient in law to maintain the said issue within joined on the part of the said *Robert Hunter*, and that they, the said *Thomas Gibson* and *Joseph Johnson*, to the matters aforesaid, in form aforesaid shewn in evidence, have no necessity, nor are they obliged by the law of the land to answer: and this they are ready to verify: wherefore, for want of sufficient matter in that behalf, shewn in evidence to the jury aforesaid, the said *Thomas Gibson* and *Joseph Johnson* pray judgment, and that the jury aforesaid may be discharged from giving any verdict in the said issue, and that the said *Robert Hunter* may be precluded from having his said action against the said *Thomas Gibson* and *Joseph Johnson*.

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“ And the said *Robert Hunter*, for that he hath shewn sufficient matter in maintenance of the said issue in evidence to the said jurors, which matter the said *Thomas Gibson* and *Joseph Johnson* do not deny, nor in any manner answer thereto, prays judgment and his damages, by reason of the premises to be adjudged to him. Joinder.

“ Whereupon it is told to the jurors aforesaid, that they shall inquire what damages the said *Robert Hunter* has sustained, as well by reason of the matter shewn in evidence as aforesaid, as for his costs and charges, by him about his suit in this behalf expended, in case it shall happen that judgment shall be given upon the evidence aforesaid, for the said *Robert Hunter*,

1793. *Hunter*, and the jurors aforesaid upon their oaths aforesaid thereupon say, that if it shall happen that judgment shall be given for the said *Robert Hunter* upon the evidence aforesaid, then they assess the damages of the said *Robert Hunter*, by him sustained by reason of the matter shewn in evidence as aforesaid, besides his costs and charges by him about his suit in this behalf expended, to 521*l.* 7*s.* and for those costs and charges to 40*s.* And thereupon the said jurors, by the assent of the said parties, are discharged from giving any further verdict upon the premises. And thereupon all and singular the premises being seen by the said court of our said lord the king, before the king himself, now here fully understood and considered, it seems to the said court here, that the aforesaid matter to the jury aforesaid, in form aforesaid, shewn in evidence by the said *Robert Hunter*, is sufficient in law to maintain the said issue above joined, on the part and behalf of the said *Robert Hunter*. Therefore it is considered by the said court of our lord the king, before the king himself here, that the said *Robert Hunter* doth recover his aforesaid damages by the jury aforesaid, in form aforesaid, assessed: and also 199*l.* 3*s.* for his costs and charges, by the said Court of our said lord the king now here adjudged of increase to the said *Robert Hunter* by his assent, which said damages in the whole amount to 722*l.* 10*s.* and that the said *Thomas Gibson* and *Joseph Johnson* be in mercy," &c.

In *Hilary* Term 1792, this demurrer to evidence was set down for argument before the Court of *King's Bench*, but it being the understanding of both parties that a writ of error was to be brought, the Court gave judgment for the Defendant in error, without argument.

Upon this judgment a writ of error was brought, returnable in parliament; and the Plaintiffs in error having assigned general errors; and the Defendant in error having pleaded that there was no error in the record and proceedings, the Plaintiffs in error hoped that the said judgment would be reversed, for the following, among other REASONS:—

First. There is no count in the declaration at all supported by the evidence.

As to the first count, there is nothing to warrant any inference or presumption that the acceptors of the bill of exchange knew the payee to be a fictitious person, at the time of their acceptance of the bill; or that they ever meant to accept a bill payable

able to such payee, or to any other description of person than the real payee, his indorsee, in the fair and usual course of negotiation. The allegations in the first count of the declaration are wholly destitute of proof, and it would be necessary, in order to support them, to presume the acceptors to be parties to a fraud without evidence, and contrary to the established rule, that every thing is to be presumed to have been fairly done, until proof is given to the contrary.

The second count is expressly negatived by the evidence.

The third count is negatived by the mere inspection of the instrument produced, which purports to be a bill payable to *Fletcher* or order; and although it has been determined that a bill purporting, on the face of it, to be payable to order, may, in particular circumstances, be considered as a bill payable to bearer; the case^(a) in which that decision was made, was where an indorsement had been made by the drawers, subsequent to the indorsement in the name of the fictitious payee, and where the acceptor was privy to the fact of the payee being fictitious at the time of the acceptance of the bill; neither of which circumstances occur in this case, but the direct contrary appears.

The fourth count depends upon the same reasoning as the third, and only differs from it by drawing a supposed inference of law, which will not follow, if the arguments used in support of the third count shall be thought insufficient.

The fifth count is negatived by the evidence, in the same manner as the third, by the mere inspection of the instrument produced, which purports to be a bill payable to *Fletcher* or order, and indorsed by him to *Livesey, Hargreave* and Company, and by them to the Defendant in error; and not a bill drawn by *Livesey, Hargreave* and Company, payable to the said *Robert Hunter*, as is supposed by the said fifth count.

The sixth, seventh and eighth counts are wholly negatived by the evidence, from which it appears, that so far from the Plaintiffs in error having engaged themselves as a collateral security to pay an antecedent debt, due from the drawers of the bill to the Defendant in error, they had actually accepted the bill, and made themselves liable (so far as any obligation to pay the bill was imposed by law upon them), previous to the bill's being discounted by the Defendant in error, and were themselves, if they are bound at all, the principal debtors, to whom

(a) *Gibson v. Minet*, ante, vol. 1. 569.

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resort must, in the first instance, be made for payment, before the Defendant in error had acquired any interest at all in the debt, or become party to the transaction. If, as is humbly submitted by the Plaintiffs in error, they were not liable, under the circumstances, as principal debtors, they could not be liable, as collateral securities, for a debt which became due from the drawer to the Defendant in error, subsequent to the acceptance.

The ninth, tenth, eleventh and twelfth counts are wholly unsupported by proof, inasmuch as it appears that so far from the Plaintiffs in error being indebted to the drawers of the bill (in whose place the Defendant in error is supposed to stand, and through whom he derives his claim), the Plaintiffs in error were actually in advance to the drawers, and had no security for their monies so lent, but bills, which have not been paid.

Lastly. On the supposition (which is wholly denied) that the Plaintiffs in error were privy to the payee being fictitious, and the indorsement being made in the name of a person they knew not to exist, and that they put the bill into the hands of the drawers that they might negotiate it, concealing the circumstance of the payee being fictitious, their conduct would amount to a direct uttering of a forgery, with intent to defraud the person to whom such bill was passed in circulation, and the remedy by civil action would be merged in the felony. If it is to be taken that the Defendant in error was acquainted with the whole transaction, and made himself a party in it, with full knowledge of all the circumstances, it is submitted that he cannot intitle himself to maintain an action through the medium of an instrument, which, at the time he received it, he knew to be a forgery.

The Defendant in error hoped that the judgment would be affirmed, for the following among other REASONS:—

First. The Plaintiffs in error having demurred to the evidence produced in support of the action, and thereby prevented the jury from finding any facts, have virtually admitted every fact, which upon the evidence the jury might have found in favour of the Defendant in error, in case the trial had proceeded and a verdict had been given; and on the other hand, no intendments, but such as are absolutely necessary, can be made in favour of the Plaintiffs in error. The evidence shews the Defendant in error to be the *bonâ fide* holder of the bill, for a valuable consideration, and the jury might upon the evidence

have found that the Plaintiffs in error accepted the bill, knowing that the name of the payee was fictitious; these facts therefore may be assumed in considering the question of law, but no act of forgery can be presumed, so as to raise the question, whether the policy of the law will suffer an action to be founded upon a transaction accompanied with forgery.

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Second. The Defendant in error being a fair holder of the bill in question, and having advanced his money upon the faith of the acceptance, and the Plaintiffs in error as acceptors sustaining no disadvantage from the drawer's using the name of a fictitious payee, the justice of the case as between the parties requires, that the acceptors should not be permitted to avoid the effect of their acceptance, and the rather, as they may be intended to have known the circumstances relating to the bill and its indorsement.

Third. The case of *Gibson and Johnson v. Minet and Fector*, lately determined in the House of Lords(a), is a decision of the highest authority to prove that the bill in question may have effect against the acceptors as a bill payable to bearer, and there does not appear to be any material distinction between that case and the present.

Fourth. An indorsement has the effect of creating a new bill, and the indorser becomes a security to the subsequent proprietors of the bill, in like manner as the original drawer; the Defendant in error, therefore, to whom this bill has been indorsed by *Livesey, Hargreave and Company*, may maintain his action against the acceptors as being the real payee of the bill, and duly so construed according to the custom of merchants.

Fifth. If the instrument could not take effect in any way as a bill of exchange, then the money which was paid for it, was advanced without consideration, and the persons who received it become indebted to the Defendant in error for the amount. The Plaintiffs in error, by the terms of their acceptance, promised to pay this debt, and the promise being founded upon a valuable consideration proved by writing, so as to comply with the requisitions of the Statute of Frauds, may entitle the Defendant in error to recover upon the counts in the declaration which apply to that view of the case.

The case having been fully argued at the bar of the House, [205] the following questions were proposed to the Judges.

(a) *Ante*, vol. I. p. 569.

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I. Whether upon the state of the evidence given for the Plaintiff in this case, it was competent to the Defendants to insist upon the Jury being discharged from giving a verdict by demurring to the evidence, and obliging the Plaintiff to join in demurrer?

II. Whether on this record, any judgment can be given?

III. In case no judgment can be given, what ought to be the award?

To which questions, Lord Chief Justice *Eyre* thus delivered the unanimous answer of the Judges.

The questions referred by your Lordships to the Judges, arise upon a proceeding, which is called a demurrer to evidence, and which though not familiar in practice, is a proceeding well known to the law. It is a proceeding, by which the Judges, whose province it is to answer to all questions of law, are called upon to declare what the law is upon the facts shewn in evidence, analogous to the demurrer upon facts alleged in pleading. My Lords, in the nature of the thing, the question of law to arise out of the fact cannot arise till the fact is ascertained. It is the province of a jury to ascertain the fact, under the direction and assistance of the judge; the process is simple and distinct, though in our books there is a good deal of confusion with respect to a demurrer upon evidence, and a bill of exceptions, the distinct lines of which have not always been kept so much apart as they ought to have been.

My Lords, in the first stage of that process, under which facts are ascertained, the Judge decides, whether the evidence offered conduces to the proof of the fact which is to be ascertained: and there is an appeal from his judgment by a bill of exceptions. The admissibility of the evidence being established, the question *how far* it conduces to the proof of the fact which is to be ascertained, is not for the Judge to decide, but for the Jury exclusively; with which Judges interfere in no case, but where they have in some sort substituted themselves in the place of the Jury in attaint, upon motions for new trials. When the Jury have ascertained the fact, if a question arises whether the fact thus ascertained maintains the issue joined between the parties, or, in other words, whether the law arising upon the fact (the question of law involved in the issue depending upon the true state of the fact) is in favour of one or other of the parties, that question is for the Judge to decide.

Ordinarily

Ordinarily he declares to the Jury what the law is upon the fact which they find, and then they compound their verdict of the law and fact thus ascertained. But if the party wishes to withdraw from the Jury the application of the law to the fact, and all consideration of what the law is upon the fact, he then demurs in law upon the evidence, and the precise operation of that demurrer is, to take from the Jury and to refer to the Judge the application of the law to the fact. In the nature of things therefore, and reasoning by analogy to other demurrers, and having regard to the distinct functions of Judges and of Juries, and attending to the state of the proceeding in which the demurrer takes place, the fact is to be first ascertained.

My Lords, with this short introduction, I proceed to the first question proposed to the Judges, which is, "Whether upon the state of the evidence given for the Plaintiff in this case, it was competent to the Defendants, to insist upon the Jury being discharged from giving a verdict, by demurring to the evidence, and obliging the Plaintiff to join in demurrer?" Your Lordships' question is confined to this particular case; but it will be necessary for me to proceed by steps. All our books agree, that if a matter of *record*, or other matter in *writing*, be offered in evidence in maintenance of an issue joined between the parties, the adverse party may insist upon the Jury being discharged from giving a verdict, by demurring to the evidence, and obliging the party offering the evidence to join in demurrer. He cannot refuse to join in demurrer, he must join, or waive the evidence. Our books also agree, that if *parol* evidence be offered, and the adverse party demurs, he who offers the evidence *may* join in demurrer if he will. We are therefore thus far advanced, that the demurrer to evidence is not necessarily confined to *written* evidence. The language of our books is very indistinct upon the question, whether the party offering *parol* evidence should be *obliged* to join in demurrer. Why is he obliged to join in demurrer, when the evidence which he has offered is in writing? The reason is given in *Croke's* report of *Baker's* case (a), because, says the book, "*there cannot be any variance of matter in writing.*" *Parol* evidence is sometimes certain, and no more admitting of any variance than a matter in writing, but it is also often loose and indeterminate, often circumstantial. The

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(a) Cro. Eliz. 753. *Middletan v. Baker*, 5 Co. 104. S. C.

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reason for obliging the party offering evidence in writing to join in demurrer, applies to the first sort of parol evidence, but it does not apply to parol evidence which is loose and indeterminate, which may be urged with more or less effect to a Jury, and least of all will it apply to evidence of circumstances, which evidence is meant to operate beyond the proof of the existence of those circumstances, and to conduce to the proof of the existence of other facts. And yet if there can be no demurrer in such cases, there will be no consistency in the doctrine of demurrers to evidence, by which the application of the law to the fact on an issue is meant to be withdrawn from a Jury, and transferred to the Judges. If the party who demurs, will admit the evidence of the fact, the evidence of which fact is loose and indeterminate, or in the case of circumstantial evidence, if he will admit the existence of the fact, which the circumstances offered in evidence conduce to prove, there will then be no more variance in this parol evidence, than in a matter in writing, and the reasons for compelling the party who offers the evidence to join in demurrer, will then apply, and the doctrine of demurrers to evidence will be uniform and consistent. That this is the regular course of proceeding, in respect to parol evidence of the nature that I have been describing, I think may be collected from the known case upon this subject, *Baker's* case. There is also another case, *Wright v. Pindar*, as it stands reported in *Aleyn's Reports* (a) which carries the doctrine further, and home to every case of evidence circumstantial in its nature, affording ground for a conclusion of fact from fact; and the two cases taken together, I think, prove satisfactorily, that the course is that which I have already supposed, and which would remove all the difficulties that are in the way of obliging the party to join in demurrer upon parol evidence. *Baker's* case, after stating that the party must join in demurrer, or waive his evidence, where a matter in writing is shewn in evidence, goes on thus: "If the Plaintiff produces witnesses to prove any matter in fact upon which a question in law arises, if the defendant admits their testimony to be true, there also the defendant may demur in law upon it, but then he ought to admit the evidence given by the Plaintiff to be true." Those cases have very carefully marked the precise ground upon which a party may demur to evidence;

(a) Al. 13. S. C. Style 22, loosely reported by the name of *White v. Pynder*.
 and

and prove that if a party *may* demur, the other party *must* join in demurrer. According to *Aleyn's* report of the case of *Wright v. Pyndar*, which case underwent very serious consideration, it was resolved, “that he that demurs upon the evidence, ought
 “to confess the whole matter of fact to be true, and not refer
 “that to the judgment of the court; *and if the matter of fact*
 “*be uncertainly alleged, or that it be doubtful whether it be true*
 “*or no, because offered to be proved only by presumptions or pro-*
 “*babilities*, and the other party demurs thereupon, he that
 “alleges this matter, *cannot* join in demurrer with him, but
 “ought to pray the judgment of the court, that he *may not be*
 “*admitted* to his demurrer, unless he will *confess the matter of*
 “*fact to be true.*” It seems to follow as a necessary conclusion, that if he will confess the matter of fact to be true, there he is to be admitted to his demurrer, and that if he is admitted, the other party must join in demurrer. My Lords, it is said in some of our books, that upon a demurrer entered upon parol evidence, the party offering the evidence may choose whether he will join in demurrer or not. But after having stated the two authorities which I have mentioned, I think those passages in the books must be understood with the qualification mentioned in both those authorities, “unless the adverse party will
 “confess the evidence to be true.” The matter of fact being confessed, the case is ripe for judgment in matter of law upon the evidence, and may then be properly withdrawn from the jury; and being entered on record will remain for the decision of the Judges. And this operation of entering the matter upon record, and indeed the whole operation of conducting a demurrer to evidence, ought to be under the direction and control of the Judge at *Nisi Prius*, or of the Court, if the trial be at the bar of one of the king's courts. I take the whole proceeding upon a demurrer to evidence, to be under the control of the Judge before whom the trial is had. In the case of *Worsley v. Filisker* which is reported in 2 *Rolle's Reports* 117, Mr. Justice Dodderidge, who was one of the ablest men upon the Bench, said, “the court might deny and hinder a party from
 “demurring by over-ruling the matter in demurrer, if it
 “seemed to them to be clear in law:” and the court did in point of fact, in that case, over-rule the demurrer, and leave the case to the Jury. The demurrer in that case was certainly frivolous; but if it had been over-ruled improperly, it might,

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I presume, have been the subject of a bill of exceptions. If the court may over-rule, it may also regulate the entry of the proceedings upon the record, and the admissions which are to be made previous to the allowing of the demurrer. And, my Lords, after this explanation of the doctrine of demurrers to evidence, I have very confident expectations that a demurrer like the present will never hereafter find its way into this House.

My Lords, The answer to the first question that the Judges have agreed upon, and which I have endeavoured to lay a foundation for, in what I have now offered to the House, is, "That upon the state of the evidence given for the Plaintiff in this case, it was *not* competent to the Defendants to insist upon the jury being discharged from giving a verdict, by demurring to the evidence, and obliging the Plaintiff to join in demurrer, *without distinctly admitting upon the record, every fact, and every conclusion, which the evidence given for the Plaintiff conduced to prove.*"

Your Lordships' second question is, Whether on this record any judgment can be given? To which we answer, that we conceive *no* judgment can be given. The examination of the witnesses in this case, has been conducted so loosely, or this demurrer has been so negligently framed, that there is no manner of certainty in the state of facts upon which any judgment can be founded. I will not detain your Lordships with particular observations upon the state of the facts, as they are contained in this demurrer, because all the observations I could have made, were made to your Lordships from within your House at the time these questions were put, and, I believe, felt by every body that heard them.

To the third question, In case no judgment can be given, what ought to be awarded? We answer, that there ought to be an award of a *venire facias de novo*: the issue joined between these parties in effect has not been tried, and the case of *Wright v. Pyndar* is expressly in point, that *another venire facias* should issue (a).

Accordingly a *venire de novo* was awarded (b).

(a) The last case respecting demurrers to evidence, which has fallen within my observation, is that of *Cocksedge v. Fanshaw*, Dougl. 119. 8vo.; and it was there holden by

the Court of King's Bench, as appears from the report, "that on a demurrer to evidence, every fact which the jury could infer in favour of the party offering it, from the evidence

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"evidence demurred to, was to be considered as admitted." It is also stated in a note subjoined to that case, that on a writ of error, the Court of Exchequer Chamber were all of opinion with the Court of King's Bench, except the Lord Chief Justice (then Mr. Baron) *Eyre*, but that afterwards in the House of Lords, his Lordship concurred with the other judges, in answering the following question proposed to them, in the affirmative, *viz.* "Whether the evidence and facts admitted, upon which that demurrer had been joined, were sufficient in law to maintain the issue for the Defendant in error?"

Now there is reason to believe that the ground upon which his Lordship agreed to the affirmative of that question was, that upon the record there was a distinct allegation of the existence of a custom in the city of *London*, that freemen factors should have to their own use, the farthing duty on the corn consigned to them; to which allegation, as well as to the facts offered in evidence, the demurrer was applied. This allegation therefore being admitted by the demurrer, the point to be considered was, whether such a custom were a good one: and it was upon that ground that the case seems to have been decided in the House of Lords.

Upon examining that record, I find it to be in the following words:

"The said *Thomas Cocksedge* by *James Wallace*, Esquire, one of his majesty's counsel learned in the law, of the counsel of the said *Thomas Cocksedge*, in maintenance of the issue within joined, before the chief justice, aforesaid, insisted and said, that the city of *London* is, and from time whereof the memory of man is not to the contrary hath been, an ancient city, and that the citizens of the said city now are and from time whereof the memory of man is not to the contrary, have been a body corporate and politic, by the name of the mayor, commonalty and citizens of the city of *London*, and that the said mayor, commonalty and citizens of the city of *London*, from time whereof the memory of man is not to the contrary, have from time to time admitted, and have used and

been accustomed, and had a right to admit such and so many persons to be freemen of the said city, as they have thought fit, upon payment to the said mayor, commonalty and citizens, of such sum and sums of money, for such respective admissions to the freedom of the said city, as the said mayor, commonalty and citizens have thought fit; and that from time whereof the memory of man is not to the contrary, there of right ought to be paid by all persons not being free of the said city, or otherwise legally exempt therefrom, importing corn into the said city of *London*, or to the liberties thereof coastwise, eastward of *London Bridge* (except from the Cinque Ports or the county of *Kent*), a toll or duty of one farthing for every quarter of corn so imported, and that the said toll or duty of one farthing a quarter, for and upon all corn so imported as aforesaid (except corn consigned to a cornfactor being a freeman of the said city, to be there sold), hath during all the time aforesaid, been paid to the said mayor, commonalty and citizens, for the use of the said body corporate, but that the said duty of one farthing a quarter, for and upon all corn so imported as aforesaid, consigned to a cornfactor, being a freeman of the said city, to be there sold, hath during all the said time, whereof the memory of man is not to the contrary, been paid, and of right ought to be paid, to or for the use of, and received by such factor, being a freeman of the said city, to whom such corn hath been consigned as aforesaid, for his own use, &c."

Then follow some admissions as to facts, of "*Thomas Fanshaw* by *John Glynn*, Esq. Serjeant at law of the counsel of the said *Thomas*," &c. &c.

After which the record goes on, whereupon in order to maintain the said issue within joined, *Benjamin Green* is produced as a witness on the part of the said *Thomas Cocksedge*, and being sworn and examined on his oath, gives in evidence, and says that, &c. &c." And afterwards the name of each witness, and the facts deposed by him are distinctly stated.

The demurrer is, "And the said *Thomas*

1793. *Thomas Fanshaw* (the Defendant)
 by *John Glynn*, Esq. Serjeant at law,
 and Recorder of the said city of
London, of the counsel of the said
 Defendant saith, that the evidence
 and allegations aforesaid, above al-
 leged on the behalf of the said *Tho-*
mas Cocksedge, the Plaintiff, are
 not sufficient in law to maintain
 the said issue, &c."

That record seems to have been
 carefully framed, and is agreeable to the
 ancient mode adopted in demurrers
 to evidence, in which it was usual to
 enter both the allegations of counsel
 in favour of the party offering the
 evidence, and the evidence itself on
 the record, and to demur as well to
 the allegations as the evidence. This
 [* 211] * appears in *Rastal's Entries*, tit. *De-*
murrer, but more particularly from
 the record in *Scholastica's case*, Plowd.
 403. which is, "Whereupon *William*
Bendloc, Serjeant at law, of counsel
 with the aforesaid *Robert* and *Scho-*
lastica, in maintenance of the assize
 aforesaid, said, That &c. &c."

And the demurrer is, "That the
 aforesaid *William Lark* and *John*

Hunt, in their proper persons, say;
 that the evidences and allegations
 aforesaid, on behalf of the said
Robert and *Scholastica* above al-
 leged, are not sufficient in law to
 maintain the assize aforesaid," &c.

In this view of the case of *Cock-*
sedge v. Fanshaw, the ultimate deci-
 sion of it does not appear to be con-
 tradicted by the present determina-
 tion. It may also be observed, that
 the language of that case is, that
 every fact which the jury could infer
 from the evidence in favour of the
 party offering it, is to be considered
 as admitted: now in the present in-
 stance, as the opinion of the judges
 was, that the evidence stated on the
 record was so extremely loose, that
 no certainty could be inferred from
 it, upon which any judgment could
 be founded, it seems not too much
 to say, that from such evidence the
 jury could not reasonably have in-
 ferred facts sufficient to warrant a
 verdict in favour of the Defendant
 in error.

(b) [See post. p. 288.]

LICKBARROW and Others against MASON and Others.

In this Term, the House of Lords directed that a *venire facias de novo* should be awarded in this case. See 2 Term Rep. B. R. 63, ante, vol. 1. 357. [5 T. R. 367. 687.]

END OF TRINITY TERM.

In the Long Vacation, died Sir JOHN WILSON, Knt., one of
 the Justices of this Court,

And in the following Term, GILES ROOKE, Esq., King's Ser-
 jeant, was appointed to succeed him, and was knighted.

C A S E S

ARGUED AND DETERMINED

1798.

IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER CHAMBER,

IN

Michaelmas Term,

In the Thirty-fourth Year of the Reign of GEORGE III.

JAMES against SEMMENS, Widow.

Wednesday,
Nov. 18th.

REPLEVIN for taking the goods and chattels of the Plaintiff, at the parish of *St. Erth* in the county of *Cornwall*, in a certain close there called the *Mowhay*, being part of a certain tenement called *Trevon*.

Where two legacies of the same sum are bequeathed to the same person by different instruments, viz. one in a will, and the other in a codicil, the legatee is intitled to both, unless there be some circumstance to shew that the intent of the testator was, that he should take but one (a).

“Avowry, because, she says, that before the said time when, &c., to wit, on the 29th day of *April*, in the year of our Lord 1790, one *Pascoe Semmens*, now deceased, the husband of the said *Katharine* (the Defendant) was possessed of the said tenement called *Trevon*, whereof the said close in which, &c. is part and parcel, for the residue of a certain term of years then to come and unexpired, and being so possessed thereof, the said *Pascoe*, in his life-time, afterwards, to wit, on the same day and year last aforesaid, in the parish aforesaid, in the county aforesaid, made his last will and testament in writing, and then and there duly signed, sealed and published the same, and thereby gave and bequeathed to her the said *Katharine* an annuity of 10*l.* a year during her natural life, and to be issuing and payable out of the said tenements free and clear of all out-goings whatsoever, and to be paid to her the said *Katharine* by the said *Pascoe*’s execu-

(a) [Vide *Coote v. Boyd*, 2 Br. C. C. 521. *Currey v. Pile*, 2 Br. C. C. 225. *Hodges v. Peacock*, 3 Ves. 735. *Holford v. Wood*, 4 Ves. 79. *Osborn v. Duke of Leeds*, 5 Ves. 369. *Benyon v. Benyon*, 17 Ves. 34. *Attorney-General v. Harley*, 4 Madd. 267. *Hurst v. Beech*, 5 Madd. 351.]

tors,

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tors, every year in the 25th day of *March*, as long as she the said *Katharine* should live, the first payment thereof to be made on *the 25th day of *March* which should next happen after the death of the said *Pascoe*, and to be paid home to the 25th day of *March* preceding the death of the said *Katharine*; and the said *Pascoe* gave the said *Katharine* a power of entry and distress upon the said tenement called *Trevon*, if the said *Katharine* should not be regularly paid in the manner in which the said *Pascoe* had before directed; and the said *Katharine* further saith, that afterwards, in the life of the said *Pascoe*, to wit, on the 24th day of *May*, in the said year of our Lord 1790, in the parish aforesaid, in the county aforesaid, the said *Pascoe* made a certain *codicil* in writing to the said will, and then and there duly signed, sealed and published the same *codicil*, and thereby declared his further will to be, and the said *Pascoe* did *thereby give and bequeath to the said Katharine*, during her natural life, in case she should be living at the time of the decease of the said *Pascoe*, the yearly sum of 10*l.* of lawful money of *Great Britain*, free and clear of all out-goings whatsoever, to be issuing and payable out of the said tenement called *Trevon*, by quarterly payment thereof, to begin and be made at the first quarter-day of payment which should happen next after the decease of the said *Pascoe*; and the said *Pascoe* did thereby charge the said tenement of *Trevon* with the payment thereof, with power to distrain in case of non-payment. And the said *Pascoe* afterwards, and before the 24th day of *June*, in the year of our Lord 1790, to wit, on the 24th day of *May*, in the year last aforesaid, in the parish aforesaid, in the county aforesaid, died possessed of the said tenement, for the residue of the said term, which said term then and there was not, and still is not, determined or expired, without altering his said will and *codicil*, and thereupon, and by reason of the aforesaid will and *codicil*, the said *Katharine* became intitled to the said several annuities so payable as aforesaid. And the said *Katharine* further saith, that afterwards, and before the said time when, &c., to wit, on the 29th day of *September*, in the year of our Lord 1792, the sum of fifteen pounds of the said last mentioned annuity, so given and bequeathed by the said *codicil* to the said *Katharine*, for six quarterly payments of the same annuity, before that time elapsed was due and owing and in arrear to the said *Katharine*. And because the said sum of fifteen pounds of the said last mentioned

mentioned annuity, on the day and year last aforesaid, and also at the said time when, &c. was due, unpaid and in arrear to the said *Katharine* as aforesaid, the said *Katharine* well avows the taking of the said goods and chattels in the said place in which, &c., and justly, &c., as a distress for the said arrears of the said last mentioned annuity, so due and unpaid to the said *Katharine* as aforesaid; and this the said *Katharine* is ready to verify, wherefore she prays judgment, and a return of the said goods and chattels, together with her damages, costs and charges in this behalf, according to the form of the statute in such case made and provided, to be adjudged to her.

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And the said *Joel* (the Plaintiff) as to the avowry of the said *Katharine* by her above pleaded, saith, that she, by reason of any thing therein contained, ought not to avow the taking of the said goods and chattels of him the said *Joel*, in the said place in which, &c., to be just, &c.; because, he says, that the aforesaid last will and testament of the said *Pascoe Semmens* deceased, is in the words following: that is to say, “ In the name of God,
 “ Amen, this is the last will and testament of me *Pascoe Sem-*
 “ mens, of the parish of *Ludgvan* in the county of *Cornwall*,
 “ Yeoman, First and principally, I commend my soul into the
 “ hands of Almighty God my Creator, and my body to be de-
 “ cently interred in the plainest manner possible, at the discre-
 “ tion of my executors hereinafter named; *item* I give and be-
 “ queath to my wife *Katharine Semmens*, her executors, admi-
 “ nistrators and assigns, all that messuage and tenement with
 “ the appurtenances, in the parish of *Madden*, called *Malfel*,
 “ now in the occupation of *Thomas Glasson*, and which was
 “ given to her by her aunt *Ursula Friggens*, to hold to her and
 “ her assigns from my death, during the remainder of the lease
 “ or leases thereof, under and subject to such rents, payment,
 “ suits and services, as are due and payable thereout, to the
 “ lord or lords of the fee. And also I give to my said wife
 “ *Katharine Semmens* whatsoever household goods and furniture
 “ were given to her, and come to her, by her said aunt *Ursula*
 “ *Friggens*; and also I give to her the liberty of continuing in
 “ my dwelling-house for a year and a day after my decease,
 “ without being liable to pay any rent, or to be molested by my
 “ executors hereinafter named, during the said day and twelve
 “ months after my death. *Item*. I give and bequeath unto my
 “ said wife *Katharine Semmens* an annuity of 10*l.* a year, during
 “ her

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“ her natural life, and to be issuing and payable out of my
 “ leasehold estate of *Trevon* in the parish of *St. Erth*, free and
 “ clear of all out-goings whatsoever, and to be paid and pay-
 “ able to her by my executors every year on the 25th of *March*
 “ as long as she lives; the first payment thereof to be made on
 “ the 25th day of *March*, which shall next happen after my
 “ death, and be paid home to the 25th day of *March* preceding
 “ her death; and I give her a *power of entry and distress* upon
 “ the said premises called *Trevon*, if she is not paid regularly
 “ in the manner I have above directed. *Item*, I give and be-
 “ queath unto my eldest brother *William Semmens*, all my
 “ wearing apparel, both linen and woollen, and 20*l.* in money,
 “ to be paid him by my executors hereinafter named, six months
 “ after my decease, if my brother *William* shall be alive at that
 “ time. *Item*. I give and bequeath unto my brother *Edmond*
 “ *Semmens* one guinea, to be paid him by my executors six
 “ months after my decease; and to my brother *Edmund*’s three
 “ daughters a guinea each, to be paid them in the same manner,
 “ and at the same time of their *father*’s legacy. *Item*. I give un-
 “ to my brother *Simon* one shilling; I give and bequeath unto
 “ my sister *Elizabeth Semmens*, for and during the term of her na-
 “ tural life, one annuity or yearly sum of 5*l.* to be issuing and
 “ payable out of my said estate called *Trevon*, to be paid quarter-
 “ ly during her life; the first payment to be made on the first
 “ quarterly days of *Christmas*, *Lady-day*, *Midsummer* or *Michael-*
 “ *mas*, which shall first happen after my death. *Item*. I give to
 “ my sister *Jane Mathews* one shilling. *Item*. I give and bequeath
 “ to *Mary Thomas*, formerly *Mary Eddy*, my wife’s niece, fifteen
 “ guineas, to be paid by my executors hereinafter named, six
 “ months after my decease. *Item*. I give my watch to my great
 “ nephew *Peter Semmens*, son of my nephew *John Semmens*.
 “ Lastly, all the rest, residue and remainder of my estate and
 “ effects, of what nature or kind soever, and wheresoever situate
 “ lying and being, I give and bequeath the same unto my two
 “ nephews *John Semmens*, son of my brother *Peter Semmens*, and
 “ *Edward Semmens*, son of my brother *Simon Semmens*; and I do
 “ hereby nominate and appoint them my residuary legatees, and
 “ joint executors of this my last will; in witness whereof, I have
 “ to this my last will and testament, written on one sheet of
 “ paper, put and subscribed my hand and seal this 29th day of
 “ *April* 1790.” And the said *Joel* further saith, that the afore-
 said

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said *codicil* of the said *Pascoe* is in the words following: that is to say, “I *Pascoe Semmens*, of the parish of *Ludgvan* in the county of *Cornwall*, blacksmith, being sick and weak in body, but of a sound and disposing mind, memory and understanding, do make and ordain this to be a *codicil* to my last will and testament, and which I do hereby order and direct shall be taken as a part and parcel thereof, and be annexed thereto, after my decease: first, my further will is, and I do hereby give and bequeath unto my dearly beloved wife *Katharine*, during her natural life, in case she shall be living at the time of my decease, the yearly sum of ten pounds, of lawful money of Great Britain, free and clear of all out-goings whatsoever, to be issuing and payable out of my estate called *Trevoon*, situate, lying and being in the parish of *St. Erth* in the said county of *Cornwall*, by quarterly payments; the first payment thereof to begin and be made, at the first quarter day of payment, which shall happen next after my decease; and I do hereby charge the said estate of *Trevoon* with the payment thereof, with power to distrain in case of non-payment. Also I do hereby give and bequeath unto my said wife *Katharine* the estate in *Manfel* now in the possession of *Thomas Glasson*, and heretofore given her by the last will and testament of her aunt *Ursula Friggens*, for and during all the estate, term, time and interest, which shall be to come and unexpired therein, from and after my decease. Also I give and bequeath to my said wife *Katharine* all that messuage, dwelling-house, gardens, orchards, fields and premises, situate, lying and being in the village of *Crowlas* in the said parish of *Ludgvan*, wherein I do now dwell, occupy and enjoy, and now in my possession, to hold to my said wife, to be peaceably and quietly enjoyed by her for and during her natural life only, without molestation of my executors, in my will named; and my further will is, and I do hereby direct, that my said wife *Katharine* shall have, hold and enjoy all my household goods and furniture, as they shall stand in my dwelling-house at the time of my decease, and my horse and cow, and all other things which shall then be on the said premises (the wheat and cider only excepted), which I do hereby give to her for and during her natural life, and from and after her decease, that then the same shall be delivered up to my executors, in good order and condition. And I do hereby

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“ hereby further order and direct, that as soon as conveniently
 “ may be after my decease, my said wife, jointly with my exe-
 “ cutors in my said will named, shall take or cause to be taken
 “ an inventory of all my household furniture, china and other
 “ goods, chattels and effects, which shall then be in my said
 “ dwelling-house only, and that each party shall sign and de-
 “ liver a copy of the same to each other. In witness whereof,
 “ I the said *Pascoe Semmens* the testator, have hereunto set my
 “ hand and seal, and published and declared this paper writing
 “ as and for a codicil to my last will and testament, and which
 “ I do hereby order and direct shall be taken as *part and parcel*
 “ *thereof and be annexed thereto* after my decease, this 24th day
 “ of *May*, in the year of our Lord 1790.” And the said *Joel*
 further saith, that the said *Pascoe Semmens* did *intend by his*
said will and codicil, to give to the said Katharine one annuity
of ten pounds a-year only, and not two several annuities, and that
 the said *Katharine* by reason of the said will and codicil, *did*
not become entitled to two several annuities, but became intitled
 to *one annuity only of ten pounds*, payable as in the said codicil
 is mentioned; and that at the said time when, &c. no part of
 the said annuity of ten pounds, given and bequeathed by the
 said will and codicil, to the said *Katharine*, was due, owing, un-
 paid, or in arrear to the said *Katharine*, and this he is ready to
 verify, wherefore he prays judgment and a return of the said
 goods and chattels, and his damages, costs and charges on
 occasion of the said taking and unjust detaining of the same,
 to be adjudged to him, &c.

To this plea there was a general demurrer.

In support of the demurrer, *Runnington*, Serjt., argued in
 the following manner.

The question is, whether the testator, *Pascoe Semmens*, in-
 tended by his will and codicil to bequeath two several annu-
 ties to his wife, the Defendant, or whether the codicil be a mere
 repetition confirmatory of the will; in which case, only one
 annuity would pass. Now as the will and codicil are distinct
 instruments, the legacy given by the last must be taken to be
 accumulative, and the Defendant is intitled to receive two an-
 nuities of 10*l.* each. By the will, the testator gives to his wife,
 describing her simply as his wife, the estate called *Malfel*, such
 household goods and furniture as were given her by her aunt,
 the liberty of continuing in his dwelling-house, for a year and
 a day

a day after his decease, without paying any rent, and also an annuity of 10*l.* a year, payable annually on the 25th of *March*. In the codicil, he uses terms of strong affection, and gives her, in addition to his former bequest, his dwelling-house and all his furniture, some few things excepted, for her life, and also an annuity of 10*l.* a year payable quarterly, whereas the other annuity was payable yearly. It is plain therefore, that his intention was, that his wife should derive greater benefit from the codicil, than she would have done from the will alone, and where such an intention can be collected, the law will favour an accumulative construction. The rule as laid down by *Lord Thurlow* in *Ridges v. Morrison*, 1 *Brown, Chanc. Rep.* 389, is, that “where a testator gives a legacy by a codicil as well as by a will, whether it be more, less, or equal, to the same person who is legatee in the will, speaking *simpliciter*, it is an accumulation.” And “where the same quantity has been given, and the same cause, or no additional reason assigned for a repetition of the gift, the Court has inferred the testator’s intention to be the same, and rejected the accumulation; but where the same quantity is given with any additional cause assigned for it, or any implication to shew that the testator meant that the same thing *prima facie* should accumulate, the Court has decided in favour of the accumulation.” Which doctrine is founded on the case of *Hooley v. Hatton*, *coram Lord Chancellor Bathurst*, and the elaborate opinion of Mr. Justice *Aston* (a). And in *Swinburne’s Treatise*, 526. it is said, “where a certain quantity is twice bequeathed, it is twice due; if in two distinct writings, as in a will and in a codicil.”

Lawrence, Serjt., contrd. The codicil contains merely a repetition of the same annuity that is given in the will. The testator shews no intention to give two annuities to his wife, but in the codicil he only varies the mode of payment of that which he had before left in his will, by directing that it should be paid quarterly, instead of yearly: and he orders that the codicil should be “taken as a part and parcel of his will”: the whole therefore is to be considered as making but one instrument.

In *Swinburne*, 526, after the passage cited on the other side, it is added, “but if in one writing, it does not make the legacy double,” and in the same book 530, it is said “if the testator

(a) Cited at length in a note to *Ridges v. Morrison*.

“do

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“do bequeath to one man a hundred pounds, and afterwards
 “in the same testament bequeath to the same man a hundred
 “pounds; the second disposition is understood to be but a re-
 “petition of the former, and all but one legacy; wherefore the
 “legatary in this case can recover but one hundred pounds,
 “unless he *make proof that it was the testator’s meaning that he*
 “*should have two hundred pounds.* Or unless where two equal
 “sums be left to one person, the one quantity were left in one
 “writing, and another quantity in another writing, suppose
 “one hundred pounds in the testament, and another hundred
 “pounds in the codicil; for here the legatary may recover two
 “hundred pounds, as two several legacies, *except the executor*
 “*prove the testator’s meaning to be contrary.*” The rule there-
 fore which *Swinburne* lays down, is subject to the intention of
 the testator. Here there is no intention whatever to be col-
 lected from the instrument, that the testator meant to give two
 annuities to his wife; “*there is no additional cause assigned,*” ac-
 cording to the doctrine of Lord *Thurlow* in *Ridges v. Morrison*.
 In that case there was a circumstance which marked the legatee
Nicholas Layton, as a peculiar object of favour, namely, the
 mentioning him as the child whom the testator had put out an
 apprentice; from which the Court inferred an intention that
 he should have an additional legacy. But in *Coote v. Coote*,
2 Brown, Rep. Chan. 521, Lord *Thurlow* determined, that where
 a second codicil was only a repetition of a former one, the lega-
 cies were not doubled, and his Lordship said “that when the
 “same legacy is given in a will and a codicil, the Court gene-
 “rally takes it as one legacy”, which is agreeable to the judg-
 ment of Lord *Hardwicke*, in *The Duke of St. Albans v. Beau-*
clerk, *2 Atk. 636*. But besides the apparent intention of the
 testator arising on the face of the whole will and codicil taken
 together; it is expressly stated on the record, and admitted by
 the demurrer, that “the said *Pascoe Semmens* did intend by
 “his said will and codicil, to give to the said *Katharine one*
 “*annuity of ten pounds a-year only.*”

The Court held, that the rule as laid down in *Swinburne* was
 the true one, *viz.* that where two legacies of the same sum were
 given to the same person, one in a will and the other in a
 codicil, without any circumstances from which the intention of
 the testator could be collected, (the proof of which would be
 thrown upon the executor,) there the legatee would be entitled
 to

to both; but that in the present case, it seems clearly to appear from the whole of the will and codicil taken together, that the meaning of the testator was, that his wife should take but one annuity. In the codicil the same annuity was repeated, which was before mentioned in the will: it was charged on the same lands, and the only difference was, that the payment was directed to be made quarterly in the codicil, and yearly in the will. That the decision of the Court was founded solely on what appeared to be the intention of the testator, on the face of the will and codicil together, without advertng to the argument, that the intention of the testator was admitted by the demurrer, which, if it had been necessary, seemed to them to deserve consideration.

Judgment for the Plaintiff.

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against
SEMMENS.

BROOKS *against* MORAVIA.

[220]

Friday,
Nov. 15th.

ON the motion of *Le Blanc*, Serjt., a rule was granted to shew cause why a suggestion should not be entered on the record, that this action was brought for a debt under 40s. and that at the time of the commencement of the suit, the *Defendant* was a tradesman, keeping a shop, and carrying on business within the City of *London*, and liable to be warned or summoned to the Court of Requests for the City, under the statutes 3 *Jac.* 1. c. 15, and 14 *Geo.* 2. c. 10.

The Court of requests for the city of *London* has no jurisdiction in a suit, unless both the plaintiff and defendant be resident within the city (a).

Adair, Serjt., shewed cause, contending that the case was not within those statutes, because it appeared from the affidavit on which the rule was obtained, that the *Plaintiff* was not a tradesman or inhabitant within the City of *London*, but resident and carrying on business in the county of *Essex*; and that the Court of Requests for the City had not jurisdiction, except where the Plaintiff as well as the Defendant was resident within the City.

The Court on looking into the statutes, were very clearly of that opinion, and

Discharged the rule.

(a) [Vide *Jonas v. Greening*, 5 T. R. 529. *Webb v. Brown*, Id. 535. accord. See also *Dillamore v. Capon*, 1 Bingh. 388, ante 29, note. 1 Chitty's Rep. 636 (n).]

1793:

Friday,
Nov. 15th.

By the statute 19 G. 3. c. 74, the clerk of assize on each circuit, is intitled to receive a certain fee for every person convicted of a transportable offence, (except petty larceny) and sentenced to transportation, hard labour, or confinement in the house of correction, and for persons capitally convicted who afterwards have received the king's pardon, on condition of being transported or imprisoned. On the Norfolk Circuit, that fee is one guinea.

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FLEETWOOD against FINCH.

THIS was an action for money had and received, in which a verdict was found for the Plaintiff, subject to the opinion of the Court on the following case.

“ The Plaintiff before and in the year 1779, was clerk of assize for the *Norfolk* circuit, and from thence hitherto hath so continued. The Defendant during all that time, hath been and still is treasurer for the county of *Norfolk*. The present action is brought to recover the sum of 171*l.* 3*s.* being the amount of fees which the Plaintiff claims to have become due to him, as such clerk of assize, from 1779 to 1791, at the assizes for the county of *Norfolk*, for persons convicted of transportable offences, and sentenced to transportation, hard labour, or confinement in the house of correction, and for persons capitally convicted, who afterwards have received the king's pardon, on condition of being *transported or imprisoned: (and on account of such persons being sent or delivered in execution of their respective sentences, orders had been drawn up by the said clerk of assize,) being after the rate of one guinea for every such person. That the clerks of assize on the different circuits in *England*, have been accustomed to receive some certain fee, for every person so convicted and sentenced, and in *London* and *Middlesex* for those whose sentences have been afterwards carried into execution; and the usual fee which has been paid in the county of *Norfolk*, has been one guinea each. That the Defendant as treasurer of the said county, has in his hands more than sufficient to pay the Plaintiff's demand, and which he has the orders of the justices at the quarter sessions to pay, and consents to pay to the Plaintiff, if the Plaintiff is intitled to the same.”

“ And the question for the opinion of the Court is, whether the Plaintiff is intitled to recover the sum of 171*l.* 3*s.* or any or what part thereof?”

Le Blanc, Serjt., for the Plaintiff. The question in this case is, whether the Plaintiff, as clerk of assize for the *Norfolk* circuit, be intitled to a fee for each person convicted at the assizes for that county, of an offence for which he was liable to be transported, and has received sentence of imprisonment in lieu of transportation, (except in cases of petty larceny) and also

also for each person, who, having been capitally convicted, has received the king's pardon, on condition of transportation or imprisonment? Now the right to this fee is established by usage, and confirmed by act of parliament: for it is stated, that the clerks of assize on the different circuits in *England*, have been accustomed to receive a certain fee, and the statute 19 Geo. 3. c. 74. provides (a) "That the clerk of assize or
 " other clerk of the court, shall have the same fee, gratuity or
 " satisfaction, as hath *usually been paid, and would have been*
 " *due* to them respectively, if such offender had been sentenced
 " to transportation, except in the case of petty larceny, wherein
 " they shall have only such fees as have usually and of right
 " been paid upon conviction for the said offence; and such
 " fees, gratuities, and satisfaction, &c. shall be paid by the
 " treasurer of the county, &c. to such clerk of assize."

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Bond, Serjt., contra. It is a principle of law, that the right of any officer to fees, must be founded either on ancient usage or act of parliament. Now in the present instance, there could be no ancient usage, the punishment of transportation having commenced no earlier than the reign of Geo. 1. and the statute 19 Geo. 3. c. 74. does not give a new fee, but only directs, that the clerk of assize shall have the same fee as hath usually been paid, and would have been due, if the offender had been sentenced to transportation. It remains therefore to be considered, whether any and what fee is given, by prior acts of parliament. The first statute that ordered convicts to be transported to the *American Plantations*, was 4 Geo. 1. c. 11. which mentions nothing respecting fees to be given to officers. This statute is confirmed by 6 Geo. 1. c. 23. which empowers the Court before whom the offenders are convicted, to appoint two justices to contract for the transportation of them, and orders that all charges incurred in making the contracts and conveying the felons shall be borne by the county, and paid by the treasurer, by order of the Justices at the Quarter Sessions, but is silent as to fees to be paid to the clerk of the assize (b): so also are 16 Geo. 2. c. 15. 20 Geo. 2. c. 46. and 8 Geo. 3. c. 15. On another ground likewise, the claim of the Plaintiff is void: the office of clerk of assize concerns the administration of justice, and no person having such an office can legally take a fee for

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(a) Sect. 30.

from transportation before the expiration of the term, s. 7.

(b) Except in cases of returning

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the execution of it, except from the king. *Co. Lit.* 368 *b.* 2 *Inst.* 209. *Stat of Westm.* 1. *c.* 26. which, according to Lord Coke, was made in affirmance of a fundamental maxim of the common law. 2 *Inst.* 210.

Le Blanc in reply. Admitting the principles laid down on the other side, they are not applicable to this case. The statute 19 *Geo.* 3. *c.* 74. contains a legislative acknowledgment that some fee had been usually paid to the clerk of assize, and a direction that such fee should be continued. Thus also the 16 *Geo.* 3. *c.* 43.(a) which passed for the employment of convicts on board the hulks, expressly provides that the clerk of assize shall be paid by the treasurer of the county, "the like satisfaction as hath been usually paid for the order of transportation of any offender."

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Lord Chief Justice EYRE. I agree with my Brother Bond, that no officer can claim a fee, except by ancient usage or act of parliament; but the fee in question is claimed under the 19 *Geo.* 3. *c.* 74. The 16 *Geo.* 3. *c.* 43. enacts, that the clerk of assize shall give a certificate in the cases mentioned in the act, and have the like satisfaction as hath been *usually paid* for the order of transportation. The 19 *Geo.* 3. *c.* 74. by varying the phrase, and adding the words, "*would have been due*", has let in all the argument used to shew that nothing was due, and the only difficulty that could arise in the case. But we must understand the expressions according to the subject-matter of the different acts. Now the subject-matter being of modern introduction no ancient usage can apply to it. We must therefore take the Legislature to have meant that the clerk of assize should have the same fee as had been usually paid since the fourth year of *George* I. for we come nearer the truth by referring the usage mentioned in the act to what then existed, than to what never existed. And it is highly reasonable that a public officer should have some fee or recompense; but the construction contended for would leave him without any.

GOULD, J. The statute 16 *Geo.* 3. *c.* 43. s. 16. directs that the clerk of assize shall not take more than 2s. 6d. as a fee for certifying a transcript, containing the effect of every indictment and conviction of offenders, who should escape from their place of confinement or hard labour, in order to their trial, and immediately afterwards, in the next section provides, that such

(a) Sect. 17.

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clerk of assize should have the like satisfaction as had been usually paid for the order of transportation of any offender. That is therefore a direct recognition that some fee had been accustomed to be paid. It is difficult to say when this fee commenced; but though transportation was not established by legislative authority before the 4 *Geo.* 1. yet long before that time (probably from the original planting of colonies in the *West Indies*), transportation was frequent, as appears from the introduction to *Kelynge's Reports*(a). And it is indeed reasonable and proper that a public officer should have a compensation for his labour; and the statutes of *Geo.* 3. contain a parliamentary recognition of a right to such compensation.

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HEATH, J., of the same opinion. Though the statute 4 *Geo.* 1. first established the transportation of offenders by authority of Parliament, yet it is well known that it was usual, long before, for the Crown to grant pardons on condition of transportation, which came in lieu of abjuring the realm. An ancient fee may attach on a modern act of parliament, such, for instance, as a fee on an oath taken before a justice of the peace, or a judge at chambers; so if a new act were to direct an officer to grant a certificate, an accustomed fee taken on granting certificates would attach.

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ROOKE, J., of the same opinion. From the 4 *Geo.* 1. to the 16 *Geo.* 3. there is a period of near sixty years, during which transportation was continually used as a punishment, and it is not to be supposed that the officer ever acted *gratis*. When therefore in the 19 *Geo.* 3. the legislature speak of a fee as having been usually paid, they must be intended to mean such as had been paid during that time.

Judgment for the Plaintiff.

(a) Tit. Directions for Justices of the Peace, p. 4. The same also appears from the preamble to the statute 4 *Geo.* 1. c. 11.

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A prescription for common of pasture for a certain number of sheep on *A.* every year at all times of the year, is well laid, though the evidence which proves the right of common, proves also that the tenant of a certain farm has a right to have the sheep folded at night on his farm, after they have fed on the common during the day (a).

BROOK *against* WILLET.

REPI.EVIN for taking twenty sheep of the Plaintiff at the parish of *Mildenhall* in the county of *Suffolk*, in a certain place there called *Undley Common*, and twenty other sheep at the parish of *Lakenheath* in the said county in a certain other place called *Undley Common, &c. &c.*

Non cepit, and avowry.

And the said *Anthony*, by *William Fuller* his attorney, comes and defends the wrong and injury when, &c. And as to the said cattle in the declaration of the said *Thomas* first particularly mentioned, and therein alleged to have been seized and taken by the said *Anthony* in the parish of *Mildenhall* aforesaid, says, that he the said *Anthony* did not take the same, in manner and form as the said *Thomas* hath above thereof complained against him, and of this he puts himself upon the country, &c. And as to the residue of the said cattle in the said declaration lastly mentioned, he the said *Anthony* well avows the taking of those cattle in the said place in which, &c. and justly, &c. because he says that the said place in which, &c. is, and at the said time when, &c. was, and from time whereof the memory of man is not to the contrary hath been, a certain large waste or common, containing in itself divers, to wit, 400 acres of land, situate, lying and being within the said parish of *Lakenheath*, in the said county of *Suffolk*; and that before and at the said time when, &c., he the said *Anthony* and *Mary* his wife, in right of the said *Mary*, were and still are seised in their demesne as of fee, of and in a certain messuage with the appurtenances, situate and being in the said parish of *Lakenheath* and county aforesaid, and that he the said *Anthony* and all those whose estate he hath, and at the said time when, &c. had, of and in the messuage with the appurtenances, from time whereof the memory of man is not to the contrary, have had and used, and been accustomed to have and use, for himself and themselves, his and their tenants and farmers, occupiers of the said messuage with the appurtenances, common of pasture for all of his and their commonable cattle (except

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(a)[It is not a variance to prove a larger prescription than that put in issue, *Rogers v. Allen*, 1 Campb. N. P. C. 309, and the note there.

See also *Rex v. Marquis of Buckingham*, 4 Campb. N. P. C. 189, and 1 Saund. 269, (new notes) 5th edit.]

sheep),

sheep), levant and couchant in and upon the said messuage with the appurtenances, in the said place in which, &c. every year at all times of the year, as to the said messuage with the appurtenances belonging and appertaining. And because the said last mentioned cattle, at the said time when, &c. were wrongfully and injuriously in the said place in which, &c. depasturing the grass there then growing, and doing damage there, by reason whereof the said *Anthony* could not have and enjoy his said common of pasture, in so ample and beneficial a manner as he then and there ought to have had and enjoyed the same, he the said *Anthony* well avows the taking of the said last mentioned cattle in the said place in which, &c. and justly, &c. as a distress for the damage there then done and doing, and this he the said *Anthony* is ready to verify, wherefore he prays judgment and a return of the said last mentioned cattle, together with his damages, costs and charges, according to the form of the statute in such case made and provided, to be adjudged to him, &c.

Plea in bar,

And the said *Thomas*, as to the plea of the said *Anthony* by him first above pleaded in bar, and whereof he puts himself upon the country, doth so likewise. And as to the said avowry of the said *Anthony* above made, as to the residue of the said cattle in the said declaration lastly mentioned, the said *Thomas* says, that by reason of any thing in that avowry alleged, the said *Anthony* ought not to avow the taking of the said cattle in the said place in which, &c. to be just, because he says, that one *Sir Thomas Charles Bunbury*, long before the said time when, &c. to wit, on the 29th day of *September* in the year of our Lord 1780, was and yet is seised in his demesne as of fee, of and in a certain messuage, and divers, to wit, 500 acres of land with the appurtenances, situate and being in the parish of *Mildenhall* in the said county of *Suffolk*; and that he the said *Sir Thomas Charles Bunbury*, and all those whose estate he had, and hath, of and in the said messuage and land with the appurtenances, from time whereof the memory of man is not to the contrary, have had and used, and been accustomed to have and use, and of right ought to have had and used, and still of right ought to have and use, for himself and themselves, his and their farmers, tenants, occupiers of the said messuage and land, with the appurtenances, *common of pasture*

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in the said place called Undley Common, in which, &c. for twenty sheep levant and couchant in and upon his said messuage and land with the appurtenances, every year and at all times of the year, at his and their free will and pleasure, as belonging and appertaining to the said messuage and land with the appurtenances. And the said Thomas further says, that the said Sir Thomas Charles Bunbury, whilst he was so seised thereof, and before the said time when, &c. to wit, on the day and year last aforesaid, at the parish of Mildenhall aforesaid, in the said county of Suffolk, did demise the said messuage and lands with the appurtenances to the said Thomas, to hold the same to the said Thomas, from the 10th day of October in the year of our Lord 1780, for and during and unto the full end and term of 12 years, from thence next ensuing; by virtue of which said demise, the said Thomas afterwards, and before the said time when, &c. to wit, on the 11th day of October, in the year last aforesaid, entered into the said messuage and land with the appurtenances, and became and was, and from thence continually until, and at the said time when, &c. remained so possessed thereof, under the said demise as tenant thereof to the said Sir Thomas Charles Bunbury; and being so possessed of the said messuage and land with the appurtenances, he the said Thomas, afterwards and before the said time when, &c. to wit, on the 29th day of April, in the year of our Lord 1790 aforesaid, put his said cattle in the said declaration lastly mentioned, then being twenty of his own sheep, levant and couchant upon his said messuage and land with the appurtenances, so by the said Sir Thomas Charles Bunbury demised to the said Thomas as aforesaid, into the said place in which, &c. to depasture the grass then there growing, and to use his common of pasture there, as it was lawful for him to do, for the cause aforesaid: and the said cattle at the said time when, &c. were in the said place called Undley Common, in which, &c. depasturing upon the grass then there growing, and using the said common of pasture of the said Thomas there, until the said Anthony, of his own wrong, at the said time when, &c. took the said cattle of him the said Thomas in the said declaration lastly mentioned, in the said place called Undley Common, in which, &c. and unjustly detained the same against sureties and pledges, until, &c. in manner and form as the said Thomas hath above thereof complained against him, and this he the said Thomas is ready to

to verify, &c. And for further plea in bar to the said avowry so by the said *Anthony* lastly above made, as to the residue of the said cattle in the said declaration lastly mentioned, he the said *Thomas*, by leave of the court, &c. saith, that by reason of any thing in that avowry alleged, the said *Anthony* ought not to avow the taking of the said cattle in the said place in which, &c. to be just, because he says that the said place called *Undley Common*, in which, &c. now is, and at the said time when, &c. was, and from time immemorial hath been, a *certain open common*, lying and being in two several parishes, (that is to say) a part thereof is, and during all that time was, situate, lying and being in the parish of *Lakenheath* aforesaid, in the said county of *Suffolk*, and another part thereof is, and during all that time was situate, lying and being in the parish of *Mildenhall*, in the said county of *Suffolk*; and the said *Thomas* further saith, that one *Sir Thomas Charles Bunbury*, long before the said time when, &c. to wit, on the 29th day of *September*, in the year of our Lord 1780, was, and yet is, seised in his demesne as of fee, of and in a certain other messuage, and divers, to wit, 500 other acres of land, with the appurtenances, situate and being in the said parish of *Mildenhall*, in the said county of *Suffolk*; and that he the said *Sir Thomas Charles Bunbury*, and all those whose estate he had and hath, of and in the said last mentioned messuage and lands, with the appurtenances, from time whereof the memory of man is not to the contrary, have had and used, and have been accustomed to have and use, and of right ought to have had and used, and still of right ought to have and use, for himself and themselves, and his and their farmers and tenants, occupiers of the said last mentioned messuage and land, with the appurtenances, common of pasture in and upon that part of the said place called *Undley Common*, in which, &c. which is situate, lying and being in the parish of *Mildenhall*, in the said county of *Suffolk* as aforesaid, for twenty sheep levant and couchant in and upon the said last mentioned messuage and land, with the appurtenances, every year, at all times of the year, at his and their free will and pleasure, as belonging and appertaining to the said last mentioned messuage and land with the appurtenances: and the said *Thomas* further saith, that such part of the said place called *Undley Common*, in which, &c. as is within the said parish of *Mildenhall* as aforesaid, now lies, and at the said time when, &c. did lie, and from time whereof the memory

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memory of man is not to the contrary, hath lain contiguous and next adjoining to that part of the said place called *Undley Common*, in which, &c. which lies within the said parish of *Lakenheath* as aforesaid, and without any hedge or fence whatsoever dividing or separating the one part thereof from the other part thereof, and that from time whereof the memory of man is not to the contrary, the cattle of each and every respective person, for the time being, having right of common of pasture in that part of the said place called *Undley Common*, in which, &c. which lies within the said parish of *Lakenheath* as aforesaid, and from time to time put into that part of the said place called *Undley Common*, in which, &c. which lies within the said parish of *Lakenheath* as aforesaid, to feed and depasture on the grass there then growing, have wandered, strayed and escaped, and have been used and accustomed to wander, stray and escape, from and out of that part of the said place called *Undley Common*, in which, &c. which lies within the said parish of *Lakenheath* as aforesaid, unto and into that part of the said place called *Undley Common*, in which, &c. which lies in the said parish of *Mildenhall* as aforesaid, and to *intercommon* and *interpasture* there with the cattle from time to time feeding on and in that part of the said place called *Undley Common*, in which, &c. which lies in the said parish of *Mildenhall* as aforesaid, at their free will and pleasure *by cause of vicinage*, and in like manner the cattle of each and every respective person, for the time being, having right of common in that part of the said place called *Undley Common*, in which, &c. which lies within the said parish of *Mildenhall* as aforesaid, and from time to time put into that part of the said place called *Undley Common*, in which, &c. which lies within the said parish of *Mildenhall* as aforesaid, to feed and depasture on the grass there then growing, have wandered, strayed and escaped, and have been during all the time aforesaid, used and accustomed to wander, stray and escape, from and out of that part of the said place called *Undley Common*, in which, &c. which lies within the said parish of *Mildenhall* as aforesaid, unto and into that part of the said place called *Undley Common*, in which, &c. which lies in the said parish of *Lakenheath* as aforesaid, and to *intercommon* and *interpasture* there with the cattle from time to time feeding on and in that part of the said place called *Undley Common*, in which, &c. which lies in the said parish of *Lakenheath* as aforesaid, at their
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free will and pleasure, *by cause of vicinage*, to wit, at the respective parishes of *Lakenheath* and *Mildenhall* aforesaid, in the said county of *Suffolk*. And the said *Thomas* further saith, that the said *Sir Thomas Charles Bunbury* being so seised of and in the said last mentioned messuage and land, with the appurtenances, as last aforesaid, he the said *Sir Thomas Charles Bunbury*, whilst he was so seised, and before the said time when, &c. to wit, on the day and year last aforesaid, at the parish of *Mildenhall* aforesaid, in the said county of *Suffolk*, demised the said last mentioned messuage and land, with the appurtenances, to the said *Thomas*, to hold the same to the said *Thomas*, from the 10th day of *October* in the said year of our Lord 1780, for, during and unto the full end and term of twelve years, from thence next ensuing, by virtue of which said last mentioned demise, the said *Thomas* afterwards, and before the said time when, &c., to wit, on the 11th day of the said *October*, in the year last aforesaid, entered into the said last mentioned messuage and land, with the appurtenances, and became, and was, and from thence continually until, and at the said time when, &c. remained so possessed thereof, under and by virtue of the said last mentioned demise, as tenant thereof to the said *Sir Thomas Charles Bunbury*; and being so possessed of the said last mentioned messuage and land, with the appurtenances, as last aforesaid, he the said *Thomas* afterwards, and before the said time when, &c., to wit, on the 29th day of *April*, in the year of our Lord 1790 aforesaid, put the said cattle in the said declaration lastly mentioned, being twenty of his own commonable sheep, levant and couchant on the said last mentioned messuage and land, with the appurtenances, so demised to him by the said *Sir Thomas Charles Bunbury* as last aforesaid, into and upon that part of the said place called *Undley Common*, in which, &c. which lies within the said parish of *Mildenhall* as aforesaid, to feed and depasture on the grass there then growing, and to use his the said *Thomas's* common of pasture there, and left the said cattle there for the purpose aforesaid, as it was lawful for him to do for the cause aforesaid; which said cattle being so put and left there for the purpose last aforesaid, afterwards and before the said time when, &c., to wit, on the day and year last aforesaid, of their own accord, and for want of fences as last aforesaid, wandered, strayed and escaped, from and out of that part of the said place called *Undley Common*,

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in which, &c. which is within the said parish of *Mildenhall* aforesaid, unto and into that part of the said place called *Undley Common*, in which, &c. which lies in the said parish of *Lakenheath* as aforesaid, for cause of vicinage, there not being then and there any hedge or fence to separate or divide that part of the said place called *Undley Common*, in which, &c. which lies in the said parish of *Mildenhall* as last aforesaid, from that part of the said place called *Undley Common*, in which, &c. which lies in the said parish of *Lakenheath* as last aforesaid; and on that occasion the said cattle were staid, remained and continued in that part of the said place called *Undley Common*, in which, &c. which lies in the said parish of *Lakenheath* as last aforesaid, feeding and depasturing on the grass there then growing, and intercommoning and interpasturing there with the cattle of the several persons then having right of common of pasture in that part of the said place called *Undley Common*, in which, &c. which lies in the said parish of *Lakenheath* as last aforesaid, for cause of vicinage, from thence until the said *Anthony* at the same time when, &c. of his own wrong took the cattle of the said *Thomas* in the said declaration last mentioned, in the said place in which, &c. and unjustly detained the same against sureties and pledges, until, &c. in manner and form as the said *Thomas* hath above thereof complained against him the said *Anthony*, and this he the said *Thomas* is ready to verify, wherefore, &c.

Replication.

And the said *Anthony*, as to the said plea by the said *Thomas* first above pleaded in bar to the said avowry, by him the said *Anthony* above made, as to the said cattle in the said declaration lastly mentioned, says, that by reason of any thing in that plea alleged, he the said *Anthony* ought not to be barred from avowing the taking of the said cattle in the said declaration lastly mentioned, in the said place in which, &c. to be just, because, as before he says, that the said cattle in the said declaration lastly mentioned, at the said time when, &c. were wrongfully and injuriously in the said place in which, &c. depasturing the grass there then growing, and doing damage there in manner and form as the said *Anthony* hath above in his said avowry alleged, “ *Without this* that the said Sir *Thomas Charles Bunbury*, and all those whose estate he had and hath, of and in “ the said messuage and lands, with the appurtenances, from “ time whereof the memory of man is not to the contrary, have “ had and used, and been accustomed to have and use, and of “ right

“ right ought to have had and used, and still of right ought
 “ to have and use, for himself and themselves, his and their
 “ farmers and tenants, occupiers of the said messuage and lands
 “ with the appurtenances, common of pasture in the said place
 “ called *Undley Common*, in which, &c. for twenty sheep, levant
 “ and couchant in and upon the said messuage and land with
 “ the appurtenances, every year, at all times of the year, at his
 “ and their free will and pleasure, as belonging and appertain-
 “ ing to the said messuage and lands, with the appurtenances,
 “ in manner and form as the said *Thomas* hath in that plea al-
 “ leged”, and this he the said *Anthony* is ready to verify, where-
 fore he prays judgment, and a return of the said cattle in the
 said declaration lastly mentioned, together with his damages,
 costs and charges, in this behalf, according to the form of the
 statute in such case made and provided, to be adjudged to
 him, &c. And the said *Anthony*, as to the said plea by the said
Thomas lastly above pleaded in bar to the said avowry, by him
 the said *Anthony* above made, as to the said cattle in the said
 declaration lastly mentioned, says, that by reason of any thing
 in that plea alleged, he the said *Anthony* ought not to be barred
 from avowing the taking of the said cattle in the said declaration
 lastly mentioned, in the said place in which, &c. to be just, be-
 cause he says, that the said *Thomas* of his own wrong, before
 the said time when, &c., to wit, on the same day and year in
 the said declaration mentioned, put the said cattle in the said
 declaration lastly mentioned, in and upon the said part of *Und-
 ley Common* aforesaid, in which, &c. lying and being within
 the said parish of *Lakenheath*; and that the said cattle in the
 said declaration lastly mentioned, at the said time when, &c.
 were wrongfully and injuriously in the said place in which, &c.
 depasturing the grass there then growing, and doing damage
 there, in manner and form as the said *Anthony* hath above in
 his said avowry alleged, “ *Without this*, that the said *Thomas*
 “ before the said time when, &c. put the said cattle in the
 “ said declaration lastly mentioned, into and upon that part
 “ of the said place called *Undley Common*, in which, &c. which
 “ lies within the parish of *Mildenhall*, to feed and depas-
 “ ture on the grass there then growing, and to use his the said
 “ *Thomas's* common of pasture there, and that the said cattle
 “ of their own accord, and for want of fences, wandered, strayed
 “ and escaped, from and out of that part of the said place
 “ called

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 " *said parish of *Mildenhall*, unto and into that part of the said
 " place called *Undley Common*, in which, &c. which lies in the
 " said parish of *Lakenheath* as aforesaid, for cause of vicinage,
 [*232] " in manner and form as the said *Thomas* hath by his said last
 " plea in bar alleged", and this he the said *Anthony* is ready to
 verify, wherefore he prays judgment, and a return of the said
 cattle in the said declaration lastly mentioned, together with his
 damages, costs and charges, according to the form of the statute
 in such case made and provided, to be adjudged to him, &c.

Rejoinder.

And the said *Thomas*, as to the said plea of the said *Anthony*
 by him above pleaded, by way of reply to the plea by the said
Thomas first above pleaded in bar to the said avowry, by him
 the said *Anthony* above made, as to the said cattle in the said
 declaration lastly mentioned, says, as before, that the said Sir
Thomas Charles Bunbury, and all those whose estate he had
 and hath, of and in the said messuage and lands, with the ap-
 purtenances, from time whereof the memory of man is not to
 the contrary, have had and used, and been accustomed to have
 and use, and of right ought to have had and used, and still of
 right ought to have and use, for himself and themselves, his
 and their farmers and tenants, occupiers of the said messuage
 and lands with the appurtenances, common of pasture in the
 said place called *Undley Common* in which, &c. for twenty
 sheep, levant and couchant in and upon the said messuage and
 land with the appurtenances, every year, at all times of the year,
 at his and their free will and pleasure, as belonging and ap-
 pertaining to the said messuage and land with the appurte-
 nances, in manner and form as the said *Thomas* hath above in
 his said plea alleged, and of this he puts himself upon the
 country. And the said *Anthony* doth so likewise, &c. And
 the said *Thomas*, as to the said plea of the said *Anthony* by him
 above pleaded, by way of reply to the plea by the said *Thomas*
 lastly above pleaded in bar to the said avowry by him the said
Anthony above made, as to the said cattle in the said declara-
 tion lastly mentioned, says, that the said *Thomas*, before the
 said time when, &c. put the said cattle, in the said declaration
 lastly mentioned, into and upon that part of the said place
 called *Undley Common* in which, &c. which lies within the
 parish of *Mildenhall*, to feed and depasture on the grass there
 then growing, and to use his the said *Thomas's* common of pas-
 ture

ture there, and that the said cattle of their own accord, and for want of fences, wandered, strayed and escaped *from and out of that part of the said place called *Undley Common*, in which, &c. which is within the said parish of *Mildenhall*, unto and into that part of the said place called *Undley Common*, in which, &c. which lies in the said parish of *Lakenheath* as aforesaid, for cause of vicinage, in manner and form as the said *Thomas* hath above in his said last plea in bar alleged, and of this he puts himself upon the country, and the said *Anthony* doth the like, &c.

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This cause was tried at the last *Summer* assizes at *Bury*, before the Lord Chief Justice of this court, when a verdict was found for the Plaintiff, on the traverses of the right of common; the evidence being, that he had a right to common of pasture at all times of the year on *Undley Common*, but that the tenant of *Undley-hall Farm* had a right to have the sheep folded on the lands of that farm, when they fed on *Undley Common*. It was also proved, by an old occupier of the farm, that he had received a compensation from a person who had turned sheep on the common, for not folding them on the farm. And now

Adair, Serjt., obtained a rule to shew cause why the verdict should not be set aside, on the ground that the prescription was not proved as laid, being qualified with the right of the occupier of *Undley-hall Farm* to have the sheep folded on his lands.

Against which *Le Blanc*, Serjt., shewed cause.

The right of the occupier of the farm was collateral to and distinct from the right of common, and not inconsistent with the prescription on the record. It was not part of an entire prescription, and therefore was not material to be stated. The folding the sheep was a condition subsequent, and not precedent, to the exercise of the right: and a subsequent condition need not be stated. Thus in *Kenchin v. Knight*, 1 *Wils.* 253, 1 *Black.* 49, the Defendant, to an action of trespass, pleaded a custom for the tenants and occupiers of certain ancient messuages to have a right of common in the *locus in quo*, and under that custom justified the putting in his swine, &c.; the Plaintiff in his replication confessed the custom as pleaded to be true as far as it went, but added, that it went farther, viz. that the swine should be rung to prevent their rooting up the ground. To this replication there was a demurrer, and it was objected that

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that it was bad, because it did not traverse the custom in the plea, and two contrary customs could not be pleaded ; but the Court held the replication good, for it admitted the custom set forth in the plea, and then added another circumstance quite consistent with it, namely, that the swine should be rung, which was rather a qualification of the custom pleaded, than a different one. And in *Griffith v. Williams*, *Say. Rep.* 56, it is laid down, that where two customs are stated, for the breach of which there are mutual remedies, it is not necessary for the party traversing the one to take any notice of the other.

Adair, Serjt., for the rule. The question is, whether the evidence supports the prescription as laid? Now the prescription is stated in a large unqualified manner, but the evidence shews that the right is narrowed, by the condition of folding the sheep on *Undley-hall Farm*. The allegation therefore is not supported by proof. The cases cited on the other side turned entirely on the forms of pleading, and in none of them was there any question how far the allegations correspond with the evidence. Those cases therefore are not applicable to the present.

The Court at first seemed to doubt whether the prescription, stating the right of common for the sheep at *all times of the year*, at the free will and pleasure of the Plaintiff, did not give him a right to continue the sheep on the common all night ; and, if so, it was repugnant to the evidence, which proved that they were to be folded at night on *Undley-hall Farm*. But upon consideration, they held that the words “ all times ” were to be understood according to the subject-matter, and the general course of feeding sheep, which seldom, if ever, remained during the night on the commons on which they were turned out to pasture, but were driven to a fold. The words therefore, “ all times ” must be taken to mean all *usual* times. That there were two prescriptions, and that the folding the sheep on *Undley-hall Farm*, was not part of an entire prescription for common of pasture on *Undley Common*, but a condition or rather a consideration, subsequent to the enjoyment of the right, and therefore not necessary to be stated ; which it would have been, had it been precedent.

And *Rooke*, J., mentioned *Gray's case*, 5 Co. 78 b. where, in “ replevin between *Gray* and *Fletcher*, in bar of the avowry “ for damage feasant, the Plaintiff entitled himself to have
“ common

“ common of pasture in the place where, &c. to his copyhold,
 “ which custom was traversed. And it was found, that he ought
 “ to have the same common, but that every copyholder had
 “ used to pay time out of mind, *pro eâdem communiâ, unam*
 “ *gallinam et quinque ova, annuatim*, and it was adjudged, that
 “ on this verdict the Plaintiff should have judgment; for the
 “ Plaintiff need not shew more than makes for him, and that is
 “ of his part” (a).

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Rule discharged.

(a) Cited Cro. Eliz. 563.

CALLAN *against* TYE.

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Friday,
 Nov. 22d.

BAIL above not being put in in due time, an attachment was regularly obtained against the sheriff. But now *Bond, Serjt.*, moved to set aside the attachment, on an affidavit that the Plaintiff had lost no time.

The Court will set aside an attachment against the sheriff issued on account of bail above not being put in, on payment of costs and perfecting bail, where the Plaintiff has not been delayed.

The Court made the rule absolute, on putting in and justifying bail and payment of costs; and they said, that if the Plaintiff had taken an assignment of the bail-bond, instead of resorting to the sheriff, as the proceedings would have been staid by perfecting bail and paying the costs, it was reasonable that the same indulgence should be allowed to the sheriff, and that the practice should be uniform (a).

Rule absolute.

(a) The same practice has been also adopted in *B. R. Hill v. Bolt*, 4 Term Rep. B. R. 352. And the rule in both courts seems to be, that if the Plaintiff has not been delayed in going to trial, the attachment

shall be set aside; but if he has been so delayed, then the attachment shall remain in the office as a security in case he should obtain a verdict. [Vide Tidd's Prac. 317, 8th Edit.]

WAUGH *against* CARVER, CARVER and GIESLER.

Saturday,
 Nov. 23d.

THIS action of *assumpsit* for goods sold and delivered, work and labour done, &c. was tried at *Guildhall* before the

A. and B.
 ship agents
 at different
 ports, enter
 into an

Lord

agreement to share, in certain proportions, the profits of their respective commissions, and the discount on tradesmen's bills employed by them in repairing the ships consigned to them, &c. By this agreement they become *liable as partners* to all persons with whom either contracts as such agent, though the agreement provides that neither shall be answerable for the acts or losses of the other, but each for his own (a).

(a) [The distinction taken in this case as to agreements constituting a partnership with regard to third persons, and yet not operating so as to render

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Lord Chief Justice, when a verdict was found for the Plaintiff, subject to the opinion of the Court on a case which stated,

That on the 24th *February* 1790, the Defendants duly executed articles of agreement as follows: "Articles of agree-
ment

render the parties themselves partners as between themselves, has been recognized in many subsequent decisions. See *Hesketh v. Blanchard*, 4 East, 144. *Bolton v. Puller*, 1 Bos. & Pul. 546, and the cases cited below.

In the principal case, there are two modes stated by which a person may render himself liable as a partner with regard to third persons. 1. "If he will lend his name as a partner, he becomes, as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy to prevent the frauds to which creditors would be liable if they were to suppose that they had lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them." 2. "He who takes a moiety of all the profits indefinitely, shall by operation of law be made liable to the losses, if losses arise, upon the principle that by taking part of the profits he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts." Since the decision of *Waugh v. Carver*, which must now be regarded as the leading case on this subject, a number of cases illustrative of these principles have occurred, the substance of which is stated below.

1. Lending the name makes a partner, for though in point of fact parties are not partners in trade, yet if one so represents himself, and by that means gets credit for goods for the other, both are liable. *Per Lord Kenyon, De Berkom v. Smith*, 1 Esp. N. P. C. 29. So if the name of a clerk is introduced into a firm, he is liable as a partner, though he has no share of the profits. *Guidon v. Robson*, 2 Campb. N. P. C. 302. (but see *Teed v. Elworthy*, 14 East, 210). But if a person holds himself out as a partner of another in one transaction only, he will not thereby render himself liable as a partner in other trans-

actions. *De Berkom v. Smith*, 1 Esp. N. P. C. 29. Nor will a person be chargeable as a partner merely by his name appearing in a firm, unless it appears that it was used with his consent. *Newcome v. Coles*, 2 Campb. N. P. C. 617; and see, as to withdrawing the name, *Goode v. Harrison*, 5 B. & A. 17. So, where *A.* suffers his name to appear in a firm, but has no participation in the profits and losses, he is not a partner as to persons who have notice of that fact. *Alderson v. Pope*, 1 Campb. N. P. C. 404 (n.), and see *Heard v. Bigg*, Manning's Index, 220. *Sed vide infra*.

2. A participation in profits will render the person participating a partner, and it is immaterial whether he receives the profits for his own benefit or as a trustee for others, *Wightman v. Townroe*, 1 M. & S. 412, and whether he takes a smaller or larger share of the profits; for whatever may be the private stipulations between the partners themselves, as to the mode in which the profits are to be shared or the losses borne, yet, as to the rest of the world, each of the partners is liable for the whole amount of the debts of the concern. *Rex v. Dodd*, 9 East, 527. It is also immaterial whether or not the party dealing with the concern knew, at the time of such dealing, that the party he charges as a partner participated in the profits. *Ex parte Geller*, 1 Rose, 297.

In order to render a person liable as partner by participating in the profits, it must appear that he was to receive a portion of the profits, as such; therefore, a remuneration made to a traveller or other clerk or agent, by a portion of the sums received by or for his master or principal, in lieu of a fixed salary, which is only a mode of payment adopted to increase or secure exertion, will not constitute a partnership. *Cheap v. Cramond*, 4 B. & A. 670. So an agreement between *A.* and *B.*, the owner of a lighter, that *A.* in con-
sideration

“ ment indented, made, concluded and agreed upon, this
 “ twenty-fourth day of *February* in the year of our Lord one
 “ thousand seven hundred and ninety, between *Erasmus Carver*
 “ and *William Carver* of *Gosport* in the county of *Southamp-*
 “ *ton* merchants of the one part, and *Archibald Giesler* of
 “ *Plymouth* in the county of *Devon* merchant of the other
 “ part. Whereas the said *Archibald Giesler*, some time since
 “ received appointments from several of the principal ship
 “ owners, merchants, and insurers in *Holland*, and other
 “ places, to act as their agent in the several counties of
 “ *Hampshire, Devonshire, Dorsetshire* and *Cornwall*; and
 “ whereas the said *Erasmus Carver* and *William Carver* have,
 “ for a great number of years, been established at *Gosport*
 “ aforesaid, in the agency line, under the firm of *Erasmus*
 “ *Carver* and Son, and hold sundry appointments as consuls
 “ and agents for the *Danish* and other foreign nations, and
 “ also have very extensive connexions in *Holland*, and other

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deration of working the lighter should receive half the *gross earnings*, Lord *Ellenborough* held, that this was only a mode of paying the Defendant wages for his labour, and was different from a participation of profits and loss. *Dry v. Boswell*, 1 Campb. N. P. C. 329. So the agreements entered into by the crews of ships employed in the whale fishery, that they shall receive a certain proportion of the produce of the cargo in lieu of wages, do not render the crew partners with the owners of the cargo. *Wilkinson v. Frasier*, 4 Esp. N. P. C. 18.2 *Mair v. Glennie*, 4 M. & S. 244. See also *Rex v. Hartley*, R. & R. Crown Cases, 139. *Evans v. Bennett*, 1 Campb. N. P. C. 300. So where a person receives from a trader an agreed sum in respect of goods sold by his recommendation, such receipt is not a receipt of a portion of the profits so as to create a partnership. *Cheap v. Cramond*, 4 B. & A. 670. Sed vide *Young v. Artell*, cited in the principal case, and see *Benjamin v. Porteous*, *post.* 590; but if a broker agrees that in lieu of brokerage, he shall have a share of the profits arising out of the sales, such agreement will make him a partner as to third persons. *Smith v. Watson*, 2 B. & C. 409. If, however, the party

is only to be paid by a salary or sum of money in *proportion to the profits*, and only relies on the profits as a fund for payment, he is not a partner, for he is not to receive a portion of the profits as such, *vide infra*, 241, *Grace v. Smith*, there cited; see also *Ex parte Hamper*, 17 Ves. 404. *Ex parte Rowlandson*, 19 Ves. 461. Although the grant of an annuity of a certain sum to a retiring partner will not render him liable as a partner, *vide infra*, 245, yet if the annuity is subject to abatement or increase, as the profits of the business may fluctuate, he will still continue liable to the creditors of the concern. *Re Colbeck*, Buck, 48.

There may be a partnership in the profits, and yet not in the goods themselves from which the profits arise. Thus an agreement between *A.* a merchant, and *B.* a broker, that the latter should purchase goods for the former, and in lieu of brokerage should receive for his trouble a certain proportion of the profits arising from the sale, and should bear a proportion of the losses, does not vest in *B.* any share in the property so purchased, or in the proceeds of it, though it may render him liable, as a partner, to third persons. *Smith v. Watson*, 2 B. & C. 401.]

“ parts

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“ parts of *Europe* ; and whereas it is deemed for their mutual
 “ interest, and the advantage of their friends, that the said
 “ *Archibald Giesler* should remove from *Plymouth* and establish
 “ himself at *Cowes* in the *Isle of Wight* ; and the said *Erasmus*
 “ *Carver* and *William Carver* and the said *Archibald Giesler*
 “ have agreed, that *each should allow to the other certain por-*
 “ *tions of each other's commissions and profits*, in manner here-
 “ after more particularly mentioned and expressed ; *Now there-*
 “ *fore this agreement witnesseth*, and the said *Archibald Giesler*
 “ doth hereby for himself, his executors and administrators,
 “ covenant, promise and agree to and with the said *Erasmus*
 “ *Carver* and *William Carver*, their executors and assigns in
 “ manner following (that is to say), that the said *Archibald*
 “ *Giesler* shall and will, when required so to do by the said
 “ *Erasmus Carver* and *William Carver*, remove from *Plymouth*,
 “ and establish himself at *Cowes* aforesaid, for the purpose of
 “ carrying on a house there in the agency line, on his account ;
 “ but in consequence of the assistance and recommendations
 “ which the said *Erasmus Carver* and *William Carver* have
 “ agreed to render in support of the said house at *Cowes*, the
 “ said *Archibald Giesler* doth covenant, promise and agree to
 “ and with the said *Erasmus Carver* and *William Carver*, that
 “ the said *Archibald Giesler*, his executors, administrators and
 “ assigns, shall and will well and truly pay or allow, or cause
 “ to be paid or allowed to the said *Erasmus Carver* and *Wil-*
 “ *liam Carver*, their executors, administrators or assigns, *one*
 “ *full moiety or half part of the commission-agency*, to be received
 “ on all such ships or vessels as may arrive or put into the port
 “ of *Cowes*, or remain in the road to the westward thereof,
 “ within the Needles, of which the said *Archibald Giesler* may
 “ procure the address, and likewise *one full moiety or half part*
 “ *of the discount* on the bills of the several tradesmen employed
 “ in the repairs of such ships or vessels ; and as there have
 “ been for a considerable time past, very general complaints
 “ made abroad of the malpractices and impositions that have
 [237] “ prevailed at *Cowes* aforesaid, and it being a principal object
 “ of the said *Erasmus Carver* and *William Carver* to counter-
 “ act and prevent such, the said *Archibald Giesler* doth further
 “ covenant, promise and agree to and with the said *Erasmus*
 “ *Carver* and *William Carver*, that he the said *Archibald Giesler*
 “ shall and will use his utmost diligence and endeavours, to
 “ prevent

“ prevent ships or vessels arriving at the East end of the *Isle of*
 “ *Wight* from being carried past the port of *Portsmouth* to that
 “ of *Cowes*, and also to induce the mariners or commanders of
 “ such ships or vessels, as may come in at the West end of the
 “ island through the *Needles*, whenever it is practicable and
 “ advisable, to proceed to *Portsmouth*, and there put themselves
 “ under the direction of the said *Erasmus Carver* and *William*
 “ *Carver*, and that he will consult and advise with the said
 “ *Erasmus Carver* and *William Carver* on and respecting the
 “ affairs of such ships or vessels as may put into and remain at
 “ the port of *Cowes* under the care of the said *Archibald Giesler*,
 “ and pursue such measures as may appear to the said *Erasmus*
 “ *Carver* and *William Carver* for the interest of the concerned.
 “ And whereas one of the causes of complaint before men-
 “ tioned, is the very heavy charge made at *Cowes* for the use of
 “ warehouses for depositing the cargoes of ships or vessels,
 “ the said *Archibald Giesler* doth also covenant, promise and
 “ agree, to and with the said *Erasmus Carver* and *William*
 “ *Carver*, that they the said *Erasmus Carver* and *William Carver*
 “ shall be at full liberty to engage warehouses at *Cowes* afore-
 “ said, on such terms and in such manner as they may think
 “ proper, in which the said *Archibald Giesler* shall not upon
 “ any grounds or pretence whatsoever, either directly or indi-
 “ rectly, interfere. And the said *Erasmus Carver* and *William*
 “ *Carver*, for the considerations hereinbefore mentioned, do
 “ hereby covenant, promise and agree, to and with the said
 “ *Archibald Giesler*, his executors and administrators, that they
 “ the said *Erasmus Carver* and *William Carver*, shall and will
 “ well and truly pay or allow, or cause to be paid or allowed to
 “ the said *Archibald Giesler*, his executors, administrators or
 “ assigns, three fifth parts or shares of the commission or agency
 “ to be received by the said *Erasmus Carver* and *William*, on ac-
 “ count of all such ships or vessels, the commanders whereof may,
 “ in consequence of the endeavours, interference or influence of the
 “ said *Archibald Giesler*, proceed from *Cowes* to *Portsmouth*,
 “ and there put themselves under the direction of the said *Erasmus*
 “ *Carver* and *William Carver*, in manner hereinbefore men-
 “ tioned, and likewise one and one half per cent. on the amount of
 “ the bills of the several tradesmen employed in the repairs of such
 “ ships or vessels, together with one fourth part of such sum or
 “ sums as may be charged or brought into account for warehouse

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“ *rent, on the cargoes of such ships or vessels respectively; and*
 “ *also one sixth part of such sum or sums as may be charged or*
 “ *brought into account for warehouse rent on the cargoes of such*
 “ *ships or vessels as may be landed at Cowes aforesaid: And also*
 “ *that they the said Erasmus Carver and William Carver, their*
 “ *executors, administrators and assigns, shall and will well and*
 “ *truly pay or allow, or cause to be paid or allowed unto the said*
 “ *Archibald Giesler, his executors, administrators or assigns, one*
 “ *fourth part or share of the commission or agency to be received*
 “ *by the said Erasmus Carver and William Carver, on account of*
 “ *all such ships or vessels that may arrive or put into the port of*
 “ *Portsmouth or remain in the limits thereof, under the care and*
 “ *direction of the said Erasmus Carver and William Carver; and*
 “ *likewise one half per cent. on the amount of the bills of the*
 “ *several tradesmen employed in the repairs of such ships or*
 “ *vessels; and in order to prevent any misunderstanding or dis-*
 “ *putes, with respect to the commission and discount to be*
 “ *paid and divided between the said Erasmus Carver and Wil-*
 “ *liam Carver and the said Archibald Giesler, and for the better*
 “ *ascertaining thereof, it is hereby mutually covenanted, de-*
 “ *clared and agreed upon between the said Erasmus Carver*
 “ *and William Carver and the said Archibald Giesler, that one*
 “ *fifth part of the commission or agency on each ship shall and*
 “ *may be first retained by the party under whose care such*
 “ *ship or vessel shall be, as a full compensation for clerks, boat-*
 “ *hire, and all other incidental charges and expences in regard*
 “ *of such ships or vessels respectively; after which deduction,*
 “ *the then remaining balance of such commissions or agency shall*
 “ *be divided between the said Erasmus Carver and William*
 “ *Carver and the said Archibald Giesler in the proportion herein-*
 “ *before mentioned; and that such commission or agency shall*
 “ *be ascertained by one party's producing to the other true*
 “ *and authentic copies of the general accounts of each ship or*
 “ *vessel under their respective care and direction, signed by*
 “ *the several masters of such ships or vessels respectively, and*
 “ *notarially authenticated. And it is hereby further cove-*
 “ *nanted, declared and agreed upon, by and between the said*
 “ *Erasmus Carver and William Carver and the said Archibald*
 “ *Giesler, that this present contract and agreement shall com-*
 “ *mence and take effect from the date hereof, and shall con-*
 “ *tinue in full force and virtue for the term of seven years,*
 “ *during*

“ during the whole of which said term, the said parties or
 “ either of them, shall not, upon any grounds or pretence
 “ whatsoever, directly or indirectly, enter into, or form any
 “ connexion, contract or agreement, with any other house or
 “ houses, or with any other person or persons whomsoever, con-
 “ cerning the commission or agency of ships or vessels, that
 “ may during the said term put into or arrive at either of the
 “ before mentioned ports of *Portsmouth*, or *Cowes*, nor shall the
 “ said *Archibald Giesler*, at the expiration of the said term of
 “ seven years, directly or indirectly establish himself at *Gos-*
 “ *port* or *Portsmouth*, nor on any grounds or pretences whatso-
 “ ever enter into or form any connexion, contract, or agree-
 “ ment, with any house or houses, person or persons whomso-
 “ ever at *Gosport* or *Portsmouth* aforesaid. And also that they
 “ the said *Erasmus Carver* and *William Carver* and the said
 “ *Archibald Giesler* shall and will meet at *Gosport* on or
 “ about the first day of *September* yearly, for the purpose of ex-
 “ amining and settling their accounts, concerning the said com-
 “ mission business, and that such party from whom the balance
 “ shall then appear to be due, shall and will well and truly pay
 “ or secure the same unto the other party, his executors, admi-
 “ nistrators or assigns, on or before the 29th day of the said
 “ month of *September* yearly. And it is hereby likewise cove-
 “ nanted, declared and agreed, by and between the said *Erasmus*
 “ *Carver* and *William Carver* and the said *Archibald Giesler*,
 “ that each party shall *separately run the risque of, and sustain all*
 “ *such loss and losses as may happen on the advance of monies*, in
 “ respect of any ships or vessel under the immediate care of
 “ either of the said parties respectively; it being the true intent
 “ and meaning of these presents, and of the parties hereunto,
 “ that *neither of them the said Erasmus Carver and William*
 “ *Carver and Archibald Giesler shall at any time or times during*
 “ *the continuance of this agreement, be in anywise injured, preju-*
 “ *diced or affected by any loss or losses that may happen to the*
 “ *other of them, or that either of them shall in any degree be*
 “ *answerable or accountable for the acts, deeds, or receipts of the*
 “ *other of them, but that each of them the said Erasmus Carver*
 “ *and William Carver and Archibald Giesler shall in his own*
 “ *person, and with his own goods and effects, respectively be*
 “ *answerable and accountable for his own losses, acts, deeds, and*
 “ *receipts.* Provided always nevertheless, and it is hereby
 “ declared

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1793. " declared and agreed to be the true intent and meaning
 WAUGH " of these presents, and the parties hereunto, that in case
 against " the houses of either of them the said *Erasmus Carver*
 CARVER. " and *William Carver* and *Archibald Giesler*, * shall dissolve
 [* 240] " or cease to exist, from any circumstances whatsoever,
 " before the expiration of the said term of seven years,
 " that then this present agreement and every clause, sentence
 " and thing herein contained, shall from thence cease, deter-
 " mine and be absolutely void, to all intents and purposes what-
 " soever; but without prejudice, nevertheless, to the settlement
 " of any accounts that may then remain open and unliquidated,
 " between the said *Erasmus Carver* and *William Carver* and
 " the said *Archibald Giesler*, which shall be settled and ad-
 " justed, within the space of six months next after the disso-
 " lution of the houses of either of them the said *Erasmus*
 " *Carver* and *William Carver* and *Archibald Giesler*; and also
 " that at the expiration of the said term of seven years, it shall
 " be at the option of the said *Erasmus Carver* and *William*
 " *Carver* to renew this agreement for the further term of seven
 " years, under and subject to the several clauses, covenants,
 " and agreements hereinbefore particularly mentioned and set
 " forth, which the said *Archibald Giesler* doth hereby engage
 " to do. And it is hereby further covenanted, declared and
 " agreed, by and between the said *Erasmus Carver* and *Wil-*
 " *liam Carver* and *Archibald Giesler*, that these presents do not,
 " nor shall be construed to mean to extend to such ships or
 " vessels that may come to the address of either of the said
 " parties respectively, for the purpose of loading or delivering
 " any goods, wares or merchandize, it being the true intent
 " and meaning of these presents, and the parties hereunto,
 " that the foregoing articles shall not, nor shall be construed
 " to bear reference to *their particular, or separate mercantile*
 " *concerns or connexions*; and that in case any disputes or mis-
 " understandings shall hereafter arise between them, respect-
 " ing the true intent and meaning of any of the articles or
 " covenants hereinbefore contained, that then such disputes
 " or misunderstandings shall be submitted to the arbitration of
 " two indifferent persons, one to be chosen by the said *Erasmus*
 " *Carver* and *William Carver*, and the other by the said *Archi-*
 " *bald Giesler*; and in case such two persons cannot agree
 " about the same, then they are hereby empowered to name
 " some

“ some third person as an umpire ; and it is hereby declared
 “ and agreed, that the award and determination of the said
 “ referees and umpire, or any two of them, concerning the ob-
 “ ject in dispute, shall be made and settled six calendar months
 “ next after such differences shall have arisen between the said
 “ parties, and shall be absolutely final, conclusive and bind-
 “ ing. And lastly for the true performance of all and every
 “ the covenants, articles and agreements hereinbefore contained,
 “ they the said *Erasmus Carver* and *William Carver* and *Archi-*
 “ *bald Giesler* do hereby bind themselves, their heirs, execu-
 “ tors and administrators, each to the other, in the penalty of
 “ five thousand pounds of lawful money of *Great Britain*, firmly
 “ by these presents.”

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In pursuance of these articles, *Giesler* removed from *Plymouth*, and settled at *Cowes*, where he carried on the business of a ship agent in his own name, and contracted for the goods, &c., which were the subject of the action.

And the question was, whether the Defendants were partners on the true construction of the articles ?

This was argued in *Trinity Term* last by *Clayton*, Serjt., for the Plaintiff, and *Rooke*, Serjt., for the Defendants, and a second time, in the present term, by *Le Blanc*, Serjt., for the Plaintiff, and *Lawrence*, Serjt., for the Defendants. The substance of the arguments for the Plaintiff was as follows :

The question in this case is, whether the articles of agreement entered into by the Defendants constituted a partnership between them ? That such was the effect of these articles, will appear by considering the general rules of law respecting partners, and the particular circumstances of the case. The law is, that wherever there is a participation of profits a partnership is created ; though there is a difference between a participation of profits and a certain annual payment. Thus in *Grace v. Smith*, 2 *Black.* 998, a retiring partner lent the other who continued in business, a certain sum of money at 5*l. per cent.*, and was to have an annuity of 300*l.* a year for seven years, the whole of which was secured by the bond of the partner who remained in trade. This was holden not to make the lender a partner ; but Chief Justice *De Grey* there said, “ The question is, what constitutes a secret partner ? Every man who has a share of the profits of a trade, ought also to bear his share of the loss ; and if any one takes part of the profits, he
 “ takes

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*“ takes a part of that fund on which the creditor of the trader
“ relies for his payment. I think the true criterion is, to in-
“ quire whether Smith agreed to share the profits of the trade
“ with Robinson, or whether he only relied on those profits as
“ a fund for payment.”* And *Blackstone, J.*, also said, *“ The
“ true criterion, when money is advanced to a trader, is, to
“ consider whether the profit or premium is certain and defined,
“ or casual and indefinite, and depending on the accidents of
“ trade : in the former case it is a loan, in the latter a partner-
“ ship.”* In *Bloxam v. Pell* cited in *Grace v. Smith*, a sum se-
cured with interest on bond, and also an agreement for an an-
nuity of 200*l.* a year for six years, if *Brooke* so long lived, as in
lieu of the profits of the trade, with liberty to inspect the books,
was holden by Lord *Mansfield* to constitute a partnership. In
Hoar v. Daws, Dougl. 371. 8vo. a number of persons unknown
to each other, and without any communication together, em-
ployed the same broker to purchase tea at a sale of the *East
India Company*. The broker bought a lot, to be divided
among them according to their respective orders, and pledged
the warrants with the Plaintiff for more money than they
turned out to be worth ; on the broker becoming a bankrupt,
the Plaintiff sued two of the purchasers, considering them all
as secret partners, and liable for the whole. But the Court
held, there was no partnership, and Lord *Mansfield* said,
*“ There is no undertaking by one to advance money for an-
“ other, nor any agreement to share with one another in the profit
“ or loss.”* In *Coope v. Eyre*, antè, vol. 1. p. 37, one of the
Defendants had bought a quantity of oil of the Plaintiffs, and
the other Defendants had agreed, before the purchase, each
to take certain shares of the quantity bought ; but when
bought, each was to do with his own share as he pleased : they
were holden not to be partners, for there was *no share of profit
or loss*. In *Young v. Axtell and another* (a), which was an
action to recover 600*l.* and upwards, for coals sold and deli-
vered by the Plaintiff, a coal merchant, an agreement between
the Defendants was given in evidence, stating that the De-
fendant, Mrs. *Axtell*, had lately carried on the coal trade, and
that the other Defendant did the same ; that Mrs. *Axtell* was to
bring what customers she could into the business, and that the

(a) At Guildhall Sittings after Hil. 24 Geo. 3. cor. Lord *Mansfield* ; cited by
Mr. Serjt. *Le Blanc* from a MS. note.

other

other was to pay her an annuity, and also 2s. for every chaldron that should be sold to those persons who had been her customers, or were of her recommending. The Plaintiff also proved, that bills were made out for goods sold to her customers, in their joint names; and the question was whether Mrs. *Artell* was liable for the debt? Lord *Mansfield* said, “he should have rather
 “*thought on the agreement only, that Mrs. Artell would be*
 “*liable, not on account of the annuity, but the other payment,*
 “*as that would be increased in proportion as she increased the*
 “*business.* However, as she suffered her name to be used in
 “the business, and held herself out as a partner, she was cer-
 “tainly liable, though the Plaintiff did not, at the time of
 “dealing, know that she was a partner, or that her name was
 “used.” And the jury accordingly found a verdict for the Plaintiff.

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It appearing therefore, from these authorities, that a participation of profits is sufficient to constitute a partnership, it remains to be seen whether the agreement in question did not establish such a participation of the profits of the agency business between the Defendants, as to make them liable as partners. In the first place, it is stated in the recital, that the *Carvers* and *Giesler* had agreed to allow each other certain proportions of each other's commissions and profits. It is then agreed, that *Giesler* should, when required by the *Carvers*, remove from *Plymouth* to *Cowes*, and there establish a house: and in consequence of the *Carvers*' recommendation and assistance to support the house, *Giesler* is to allow them a moiety of the commission on ships putting into the port of *Cowes*, or remaining in the road to the westward, addressed to him, and a moiety of the discount on the tradesmen's bills, employed on such ships: he also covenants to advise with the *Carvers*, and pursue such measures as may appear to them to be for the interest of the concerned. On the other hand, the *Carvers* agree to pay *Giesler* three fifths of the agency of all vessels which shall come from *Cowes* to *Portsmouth*, and put themselves under the direction of the *Carvers*, by the recommendation of *Giesler*, one half *per cent.* on tradesmen's bills, and certain proportions of warehouse rent and agency. Each party is likewise to produce true copies of the accounts of the ships to the other, and neither is to form any other connexion in the agency business during the period agreed upon; and they are to meet
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once a year at *Gosport* to settle their mutual accounts, and pay over the balance. Now it was not possible to express in clearer terms, an agreement to participate in the profits of the business of ship agents, and to establish a joint concern between the two houses. It may be objected that there is a proviso that neither of the parties shall be answerable for the losses of the other; but this would certainly be not binding on the creditors. *Lord Craven v. Widdows*, 2 *Chan. Cas.* 139. *Heath v. Percival*, 1 *Pre. Wms.* 682. *Rich v. Coc*, *Comp.* 636. An agreement to share profits alone cannot prevent the legal consequence of also sharing losses for the benefit of creditors. Perhaps it may be difficult to find an exact definition of a partnership, but it has been always holden, that where there is a share of profits, there shall also be share of losses, for whoever takes a part of the capital, or of the profits upon it, takes a part of that fund to which the public have given credit, and to which they look for payment. If there be no original capital, the profits of the trade are themselves a capital, to which the creditor is to have recourse. Thus, if in the year 1791 the profits were 100*l.*, and in the year 1792 there was a loss of 10*l.* of course the profits of the preceding year would be the stock to which the creditor would resort for the payment of the debts which constituted part of the loss of the succeeding year. Indeed it is by no means necessary that to constitute a partnership, the parties should advance money by way of capital; many joint-trades are carried on without any such advance: there is therefore no ground to object, in the present instance, that neither party brought any money into a common stock, in order to carry on their business.

On behalf of the Defendants, the arguments were as follow:— The question is, whether this agreement creates such a partnership as to make all liable to the debts of each? A partnership may be defined to be, “the relation of persons agreeing to join stock or labour, and to divide the profits.” Thus *Puffendorf* described it, “*Contractus societatis est, quo duo pluresve inter se pecuniam, res, aut operas conferunt, eo fine, ut quod inde redit lucri inter singulos pro ratâ dividatur*”, *lib. 5. cap. 8.* Partners, therefore, can only be liable on the ground of their being joint-contractors, or as partaking of a joint stock. In many cases in which questions of this sort have arisen, and the persons have been holden to be partners, goods had been sold, and a
common

common fund established, to which the creditor might look for payment; and there it was highly reasonable to hold, that if many persons purchase goods on their joint account, though in the name of one only, and are to share the profits of a resale, they shall be considered as joint-contractors, and therefore liable as partners. So if a joint stock or capital, or joint labour be employed, each party is interested in the thing on which it is employed, and in the profits resulting from it. But in the present case there is no joint contract for the purchasing goods, nor any joint stock or labour, but the parties are to share in certain proportions the profits of their separate stock and separate labour; there was no house of trade or merchandize established, but two distinct houses, for the purpose of carrying on the business of ship agency, on two distinct accounts. The profits are not a capital unless carried on as capital, and not divided. Ship agents are not traders, but their employment is merely to manage the concerns of such ships in port as are addressed to them. Suppose two fishermen were to agree to share the profits of the fish that each might catch, one would not be liable for mending the nets of the other. So if two watermen agree to divide their fares, neither would be answerable for repairing the other's boat. Nor would any artificers, who entered into similar agreements to share the produce of their separate labour, be obliged to pay for each other's tools or materials. And this is not an agreement as to the agency of all ships with which the parties were concerned, for such as came to the particular address of one were to be the sole profit of that one. It was indeed clearly the intent of the parties to the agreement, and is so expressed, that neither should be answerable for the losses, acts or deeds of the other, and that the agreement should not extend to their separate mercantile concerns. It must therefore be a strong and invariable rule of law that can make the parties to the agreement responsible for each other against their express intent. But all cases of partnership which have been hitherto decided, have proceeded on one or other of the following grounds:—1. Either there has been an avowed authority given to one party to contract for the rest. 2. Or there has been a joint capital or stock. 3. Or, in cases of dormant partners, there has been an appearance of fraud in holding out false colours to the world. Now the present case is not within either of those principles; because there

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was no authority given to either party to contract for the others; nor was there any joint capital or stock; nor were the public deceived by any false credit; no fraud is stated or attempted to be proved, nor can the Court collect from the articles that any was intended: it was merely a purchase of *Giesler's* profits, by giving him a share of those of the *Carvers*, to prevent a competition between them.

Lord Chief Justice EYRE. This case has been extremely well argued, and the discussion of it has enabled me to make up my mind, and removed the only difficulty I felt, which was, whether by construing this to be a partnership, we should not determine, that if there was an annuity granted out of a banking house, to the widow, for instance, of a deceased partner, it would make her liable to the debts of the house, and involve her in a bankruptcy. But I think this case will not lead to that consequence.

[246] The definition of a partnership cited from *Puffendorf* is good as between the parties themselves, but not with respect to the world at large. If the question were between *A.* and *B.* whether they were partners or not, it would be very well to inquire whether they had contributed, and in what proportions, stock or labour, and on what agreement they were to divide the profits of that contribution. But in all these cases a very different question arises in which that definition is of little service. The question is generally, not between the parties, as to what shares they shall divide, but respecting creditors claiming a satisfaction out of the funds of a particular house, who shall be deemed liable in regard to these funds? Now a case may be stated, in which it is the clear sense of the parties to the contract that they shall not be partners; that *A.* is to contribute neither labour nor money, and, to go still farther, not to receive any profits. But if he will lend his name as a partner, he becomes, as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable, if they were to suppose that they lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them, to whom, without the others, they would have lent nothing. The argument gone into, however proper for the discussion of the question, is irrelevant to a great part of the case. Whether these persons were to interfere

terfere more or less with their advice and directions, and many small parts of the agreement, I lay entirely out of the case; because it is plain upon the construction of the agreement, if it be construed only between the *Carvers* and *Giesler*, that they were not nor ever meant to be partners. They meant each house to carry on trade without risk of each other, and to be at their own loss. Though there was a certain degree of control at one house, it was without an idea that either was to be involved in the consequences of the failure of the other, and without understanding themselves responsible for any circumstances that might happen to the loss of either. That was the agreement between themselves. But the question is, whether they have not, by parts of their agreement, constituted themselves partners in respect to other persons? The case therefore is reduced to the single point, whether the *Carvers* did not intitle themselves, and did not mean to take a moiety of the profits of *Giesler's* house, generally and indefinitely as they should arise, at certain times agreed upon for the settlement of their accounts. That they have so done is clear upon the face of the agreement: and upon the authority of *Grace v. Smith*(a), he who takes a moiety of all the profits indefinitely, shall, by operation of law, be made liable to losses, if losses arise, upon the principle that by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts. That was the foundation of the decision in *Grace v. Smith*, and I think it stands upon the fair ground of reason. I cannot agree, that this was a mere agency, in the sense contended for on the part of the Defendants, for there was a risk of profit and loss: a ship agent employs tradesmen to furnish necessaries for the ship, he contracts with them, and is liable to them, he also makes out their bills in such a way as to determine the charge of commission to the ship owners. With respect to the commission indeed, he may be considered as a mere agent, but as to the agency itself, he is as much a trader as any other man, and there is as much risk of profit and loss to the person with whom he contracts, in the transactions with him, as with any other trader. It is true he will gain nothing but his discount, but that is a profit in the trade, and there may be losses to him as well as to the owners. If therefore the principle be true, that he who takes the general

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(a) 2 Black. 998.

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profits of a partnership must of necessity be made liable to the losses, in order that he may stand in a just situation with regard to the creditors of the house, then this is a case clear of all difficulty. For though, with respect to each other, these persons were not to be considered as partners, yet they have made themselves such with regard to their transactions with the rest of the world. I am therefore of opinion that there ought to be judgment for the Plaintiff.

GOULD, J. I am of the same opinion.

HEATH, J. I am of the same opinion.

ROOKE, J., having argued the case at the bar, declined giving any opinion.

Judgment for the Plaintiff.

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Saturday,
Nov. 28d

EMERSON, One, &c. against LASHLEY.

No action will lie in this court, to recover costs ordered to be paid by a rule of an inferior court in the course of a suit there, notwithstanding the Defendant should not be liable to an attachment of the inferior court, by being resident out of its jurisdiction. But such an action having been

brought, the Court ordered the costs awarded to the Plaintiff in the inferior court, to be deducted by the prothonotary from those allowed to the Defendant in the action (a).

(a) [It seems that an action will not lie on a rule of Court for payment of money, either in the same or in any other Court; and that, therefore, where there is no judgment for

the costs, an attachment is the only mode of recovering them. See *Smith v. Whalley*, 2 Bos. & Pul. 484. *Fry v. Malcolm*, 4 Taunt. 705. *Carpenter v. Thornton*, 3 B. & A. 57.]

taking

taking of the said Defendant thereafter next mentioned, to wit, on the 19th day of *February*, in the 80th year of our said lord the king, a certain *rule or order* was made by the said court of our said lord the king before the mayor and aldermen aforesaid, in the chamber of the *Guildhall* aforesaid, whereby it was ordered, that the said *Emerson*, the *Plaintiff's attorney in the said action and attachment*, should at the next sitting of the Court shew cause why he the said *Emerson* had *refused to proceed in the said action and attachment* for the said now Defendant, and to answer the matter contained in a certain *affidavit* of the said Defendant, and one *William Norfolk Johnson*, as by the said rule or order (reference being thereunto had) will more fully appear: and such proceedings were thereupon had, that afterwards and before the making of said promise and undertaking of said Defendant thereafter next mentioned, to wit, on the 14th day of *May* in the thirtieth year aforesaid, at *London*, &c. a certain *other rule or order* was made by said Court of our said lord the king, before the mayor and aldermen aforesaid, in the chamber of the *Guildhall* aforesaid, upon reading the said first mentioned rule, and upon hearing counsel for said Plaintiff and said Defendant respectively, and reading the affidavits of said Defendant and *William Norfolk Johnson*, and the affidavits of said Plaintiff and of *John Smith* and *Samuel Hawkins*, whereby it was ordered, that the said *first mentioned rule* should be discharged with costs (a), to be taxed by the proper officer as by said rule or order so made as last aforesaid (reference being thereunto had) will more fully appear; and the said *Emerson* averred, that afterwards, to wit, on the 7th day of *June*, in the 80th year aforesaid, at *London*, &c. the costs of and attending the said last mentioned rule or order were taxed and allowed by one *Thomas Whittle*, the proper officer in that behalf, at a large sum of money, to wit, the sum of 9*l.* 14*s.* 5*d.* of lawful money of *Great Britain*; of all which said several premises, the said Defendant afterwards, to wit, on same day and year last aforesaid, at *London*, &c. had notice; and by means thereof, and according to the form and effect of said last mentioned rule or order, the said Defendant then and there became liable to pay to the Plaintiff the said sum of 9*l.* 14*s.* 5*d.* when the said De-

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(a) The words of the latter rule were, "It is ordered that the said rule (i. e. the first rule) be dis-

"charged with costs, to be taxed by
 "the proper officer of this court."

fendant

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fendant should be thereunto afterwards requested; and being so liable, the said Defendant in consideration thereof, afterwards, to wit, on same day and year last aforesaid, at *London*, &c. promised to pay, &c." There were also the common counts.

The Defendant at first demurred generally to the first count, and pleaded the general issue to the others; but the demurrer was afterwards withdrawn, and *non assumpsit* pleaded to the whole declaration. The cause therefore went to trial, and a verdict was found for the Plaintiff on the first count, subject to the opinion of the Court on the question whether the action could be maintained?

N. B. It appeared at the trial, that the Defendant at the time of entering the action and attachment in the Mayor's Court, and also at the time when the present action was brought, was resident out of the jurisdiction of that court.

Runnington, Serjt., on the part of the Plaintiff. There was sufficient ground in this case on which an *assumpsit* might be raised, for wherever there is a legal or equitable obligation to pay money, the law will imply a promise, according to the doctrine of Lord *Mansfield* in *Hawkes v. Saunders*, *Cowp.* 290. and *Rann v. Green*, *Cowp.* 476.: and thus in *Walker v. Witter*, *Dougl.* 1. a foreign judgment was holden to be a sufficient consideration to raise an *assumpsit*. In the present case, the Defendant was under a legal obligation to pay the costs, which he was ordered to pay by a court of competent jurisdiction, and the Court will therefore imply an *assumpsit* in him. Those costs were not imposed on him by way of penalty, but to indemnify *Emerson* for the expence of defending himself against a rule which had been granted against him without foundation. Though indeed in former times costs were considered as a penalty, yet they are now taken to be a debt, and go to the executor or administrator, 1 *Term Rep. B.R.* 103. *The King v. Chamberlayne*; and being a debt, they may be proved under a commission of bankrupt against the Defendant, 2 *Term, B. R.* 261. *Gulliver v. Drinkwater*, though judgment be not signed till after the commission has issued, 2 *Black.* 1317. *Aylett v. Harford*. It may possibly be said, that the proper remedy was an attachment in the Mayor's Court; but supposing this to be true, it must be on the ground of a legal obligation on the Defendant to pay, and if so, the law will create a duty. If there

there be two remedies, the party may elect which he will choose to pursue. But in fact, in the present case, there could be no remedy by attachment, the Defendant living out of the jurisdiction of the inferior court. If therefore an action will not lie for the costs, the Plaintiff is without any redress.

Clayton, Serjt., contra. No instance has been shewn of an action being brought for costs awarded by an interlocutory order in an inferior court: and if such an action has never yet been brought, it affords a strong presumption that it will not lie (a). According to this principle, *Littleton, sect. 108.* speaking of an action against the guardian in chivalry upon the statute of *Merton*, for the disparagement of the heir by marriage, says, "It seemeth to some, that no action can be brought upon this statute, insomuch as it was never seen or heard, that any action was brought upon the statute of *Merton* for this disparagement against the guardian for the matter aforesaid; and if any action might have been brought for this matter, it shall be intended that at some time it would have been put in *ure*" (b). Although it be true, that in many cases the law will imply a contract where there is a debt or duty, yet there is neither in this case, the costs or an interlocutory rule being merely in the nature of a penalty. Those costs are entirely of a distinct kind from costs in the cause, which are given by the statute of *Gloucester*, and combined with the debt in the final judgment. Whether the Defendant be within the jurisdiction of the Mayor's Court or not, if the superior courts have no power to create a debt, by ordering the payment of costs on an interlocutory proceeding, which they clearly have not, neither can the inferior courts have that power. But if it were to be allowed, that the superior courts of *Westminster-hall*

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(a) Here the learned Serjeant mentioned a case of *Payne v. Lacon*, as having been decided in the Court of Exchequer in the year 1780, which was an action of the same kind with the present, to recover costs awarded on a rule in that Court, and which that Court held, could not be supported. But as it was cited from memory, and all the circumstances of it not precisely known, I have taken the liberty to omit it in the statement of the argument.

(b) In the great case of *Ashby v. White*, 2 *Ld. Raym.* 944. this passage in *Littleton* is cited by *Powys, Jus-*

tice, in his fourth reason, as affording an argument to shew that the action in that case would not lie, because such a one had never been brought before. But that opinion is controverted, and the passage commented upon by *Holt, Ch. J.*, p. 957. See also, *Hargr. and Butl. Co. Litt.* 81 b. n. (2). [*Chapman v. Pickersgill*, 2 *Wils.* 146. *Lecaux v. Eden*, *Dougl.* 602. *Russell v. Men of Devon*, 2 *T. R.* 673. *Pasley v. Freeman*, 3 *T. R.* 63. *Berkley v. Presgrave*, 1 *East*, 225. *Duke of Newcastle v. Clark*, 8 *Taunt.* 621. *Carpenter v. Thornton*, 3 *B. & A.* 57.]

should

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should execute the orders of the inferior, the authority of the latter would be co-extensive with that of the former. Besides, if this action were to be maintained, the order of the inferior court must be taken to be conclusive, for the superior court would not go into evidence to learn whether the inferior did right in making such order, and then the consequence would be, that the superior Court would enforce that order whether right or wrong.

Lord Chief Justice EYRE. If there were nothing else in this case but the mere circumstance of its being an action brought for the first time, the Court would think again and again, before they would give it any encouragement. In general, there is another remedy, (however that remedy may fail in an inferior court, whose jurisdiction is local,) and the consequence of our determining that an action would lie for such costs as these, would be, that instead of applications to the Court for their superior interference, numberless actions would be brought, of which we have enough already. And upon general principles of law, it seems pretty clear that no action can lie for such costs. In actions brought in superior courts, the costs become a duty only by being united with the debt in the judgment: there is that sort of credit given to the judgments of a court of competent jurisdiction, that they create debts and duties, upon which actions of debt are founded. General policy and convenience require, that faith should be given to those judgments, and that duties should arise; but as to the conduct, and all the steps belonging to the conduct of the interlocutory proceedings, they are fit to be regulated by the authority of the court where they arise, but by no means fit to be the foundation of general duties creating moral obligations. It is the power of the Court that enforces these kind of orders, and the power of the Court will always be regulated by the discretion

[252] of the Court, in causes which come before them. I was very much struck with an observation of my Brother *Clayton*, that if we suffer an action to be brought for costs thus ordered to be paid in an inferior court, we must take that order to be final: we give credit indeed to judgments of inferior courts, because there is a regular course, if those judgments are improper, by which they may be corrected; but the case is very different with respect to these interlocutory orders, from which there is no appeal or writ of error. It would be impossible to
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take one of these interlocutory proceedings as final, and if we were to inquire whether the inferior court had done right, what a new field would be open for investigation! If a superior court were to take into consideration a cause with which they had nothing to do, and to give judgment whether the inferior court had done right in making an interlocutory order, it would be impossible for any such court to go on with its ordinary business. The case that comes the nearest to the support of this action, is that of *The King v. Chamberlayne* (a), where the Court of King's Bench decided, that the costs upon a recognizance to prosecute were in the nature of a debt, which an administrator might claim. But the expressions in that case must be understood according to the subject-matter; properly speaking, those costs were not a debt to any one, for if they were a debt, there was no occasion for a recognizance to enforce the payment of them; the Court indeed held, that the original right devolved from the original party to the administrator, but if it were not a debt to the original party, it was not a debt to his representative: the recognizance indeed was merely a security, without which, the costs could not have been recovered at all. That case, therefore, rather makes against the argument to which it is applied. Upon the whole, therefore, though there will be a particular inconvenience arising in this case, from the circumstance of the Defendant being out of the jurisdiction of the inferior court, it is better to oblige the other party to wait, till he can be brought within that jurisdiction, than to produce the mischievous consequences, which would ensue from our determining that this action could be maintained.

GOULD, J. I agree with my Lord, according to the rule of law laid down by *Littleton* and Lord *Coke*, that it is better to submit to a particular inconvenience, than introduce a general mischief. It is apparent, what an ill use might be made, of our establishing a precedent of this kind. Did any man ever hear of an action in a superior court to recover costs, where there had been an interlocutory reference to a Prothonotary or Master? It has been always holden, that an attachment was the proper remedy on the *allocatur*.

HEATH, J. I am of the same opinion. The question arises upon an action for costs, given by an interlocutory order, which

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(a) 1 Term Rep. B. R. 103.

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are not costs given by the statute of *Gloucester*. It is a motion in an inferior court, by a party against his own attorney; the court, acting upon a power it has over its own ministers, declares the complaint groundless, and inflicts a penalty. As therefore these costs are a penalty, and not given by the statute of *Gloucester*, I am of opinion that the action will not lie.

ROOKE, J. I am of the same opinion. I think it would be very dangerous to encourage actions of this sort.

Judgment for the Defendant.

On a subsequent day, a rule was granted to shew cause why the costs awarded to the Plaintiff in the Mayor's Court, should not be deducted from the costs to be allowed to the Defendant in the present action, and why the Prothonotary should not make his *allocatur* after the deduction.

Against which *Clayton* shewed cause, by urging that in cases where costs had been set off against each other, they were considered as debts, for which there were mutual remedies by action.

Runnington, Serjt., for the rule contended, that the Court might, in their discretion, order the deduction to be made, and cited *Thrustout v. Crafter*, 2 *Black.* 826, and *Schoole v. Noble*, *antè*, vol. 1. 23; he observed also the peculiar hardship the Plaintiff would be under, if the application were refused, as he had no remedy to recover the costs given him by the rule in the inferior court.

The Court, without hesitation, said it was highly reasonable to allow the deduction, and therefore made the

Rule absolute.

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Monday,
 Nov. 25th.

NICHOLSON *against* CHAPMAN.

A quantity
 of timber,
 placed in a
 dock on the
 bank of a
 navigable

river, being accidentally loosened, is carried by the tide to a considerable distance, and left at low water upon a towing path. *A.* finding it in that situation, voluntarily conveys it to a place of safety, beyond the reach of the tide, at high water. *A.* has no lien on the timber for the trouble or expence to which he may have put himself in the carriage of it, but is liable to an action of trover, unless he deliver it up to the owner on demand, though nothing be tendered him by the owner by way of compensation (*a*). But in such a case, in all probability, *A.* might maintain an action against the owner for a compensation.

THIS was an action of *trover*, brought under the following circumstance. A considerable quantity of timber, the property of the Plaintiff, was placed in a dock on the banks of the

(a) [Vide *Lempriere v. Pasley*, 2 T. R. 485.]

Thames,

Thames, but the ropes with which it was fastened accidentally getting loose, it floated, and was carried by the tide as far as *Putney*, and there left at low water, upon a towing path within the manor of *Wimbledon*. Being found in this situation, the bailiff of the manor, one *Fairchild*, employed the Defendant *Chapman*, to remove the timber with his waggon from the towing-path, which it obstructed, to a place of safety at a little distance. This *Chapman* accordingly did, and when the Plaintiff sent to demand the timber to be restored to him, refused to deliver it up, unless 6*l.* 10*s.* 4*d.* were paid, which he claimed partly by way of salvage, as a customary right due to the lord of the manor, and partly as a recompense to himself for the trouble of drawing the timber from the water side to the place where it then lay: but this demand the Plaintiff refused to comply with, and did not tender any other sum. The bailiff acted under the following order, made at a court-leet of the lord of the manor, in *May* 1792, “Complaint having been made to this court of the great detriment arising to the tenants, &c. within this manor, from timber having been left by the tide upon the towing-path within the same; it is ordered, that *Francis Fairchild*, the bailiff of this manor, do, under the authority of this court, remove the same to a proper place of safety, until the lord or his steward shall give proper directions, for the benefit of the particular owner or proprietor thereof.” But no such customary right as was set up in the lord, was established at the trial; the Lord Chief Justice therefore directed the jury to ascertain what they thought a proper compensation for the carriage of the timber by the Defendant, as above stated. They answered that two guineas were a reasonable sum for that purpose, upon which it was agreed that a verdict should be found for the Plaintiff for the value of the timber, subject to the opinion of the Court on the question, whether there ought not to have been a tender of two guineas, before action brought: if the Court should be of that opinion, the verdict to be entered for the Defendant, he undertaking to deliver up the timber on payment of two guineas; but if they should be of a contrary opinion, then the [255] verdict to be entered for the Plaintiff for the value.

This question was now argued by *Adair* and *Runnington*, Serjts., on the part of the Plaintiff, as follows.

The first question is, whether the refusal to deliver the timber,

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timber, on the part of the Defendant, was not tortious, and evidence of a conversion? It is sufficient to make the refusal tortious, that he was unable to support the demand which he made, as a condition of the delivery. That demand was for 6*l.* 10*s.* 4*d.*, which included the sum supposed to be due by custom to the lord of the manor, as well as a recompence to the Defendant for conveying the timber to the place where it lay: but such customary right was not supported at the trial. Now upon a general demand, a refusal to deliver goods without annexing a condition to the delivery, with which the owner is not bound to comply, is a tortious refusal, and amounts to evidence of a conversion. It being then ascertained that the condition imposed by *Chapman* was unreasonable, the remaining question will be, whether the demand of the Plaintiff, unaccompanied with any tender, were a legal demand? Now the Plaintiff was not bound to tender any thing, unless the Defendant could have maintained a demand against him. But it is clear that *Chapman* took the goods merely by the direction of the bailiff of the manor, and not with any view or motive to preserve them for the true owner, or to act in any manner for his benefit: *Chapman* therefore had no right of action against the Plaintiff. If he could have maintained any action, he must have declared as having done what he did, at the special instance and request of the Plaintiff; but such an implication would have been negatived by evidence, shewing that the timber was taken for the payment of a duty to the lord of the manor. And as it was not taken with a view to preserve it for the owner, no arguments from the general doctrine of salvage can be applicable to this case. If therefore the Defendant was not intitled to make a demand on the Plaintiff, he could have no lien on the timber, so as to justify him in refusing to deliver it.

Bond and *Clayton*, Serjts., thus argued on the other side. The demand of the Plaintiff, unless accompanied with a tender of proper satisfaction for the trouble and labour which the Defendant had exerted in saving his property, was not such a demand as that a refusal to comply with it will make the Defendant guilty of a conversion. The Defendant was entitled to such satisfaction on grounds of public policy, for the timber having been left by the falling of the tide on the bank of the river, might at high water have floated again, and been carried farther

farther off; the removing it therefore from the place where it lay, was clearly a benefit and convenience to the owner. This case bears a resemblance to that of salvage, but is much stronger: for salvage generally arises from the dangers of the seas, against which no human prudence can guard; but here the timber probably got loose from the moorings, from the careless manner in which it was fastened. In the case of salvage, by the authority of the common law, the person who saves the property of another is not guilty of a conversion by refusing to deliver it up till there has been tendered to him a reasonable compensation. 1 *Ld. Raym.* 393, *Hartford v. Jones*, *Salk.* 654. *pl.* 2. And though the Defendant in this instance might have made too large a demand, yet the demanding a sum larger than that which the jury have found to be reasonable could not be a forfeiture of the original right. By the common law, every person who employs labour or skill on the goods of another without a special contract, is intitled to retain them till a proper recompence is made. Thus likewise the owner of an estray must tender to the lord the expences which have been incurred in the finding, keeping and proclaiming it, before he is intitled to a return (*a*); and it is laid down, 1 *Roll. Abr.* 879. *pl.* 5. that if the lord require more for amends than is reasonable, still if the owner does not tender sufficient amends for the feeding, the detainer of the estray (*b*) is lawful. Supposing the position to be true as laid down by the other side, that *Chapman* had no right of action for his trouble and labour, it is clearly in favour of his right to detain the timber, since it is a principle of law and justice, that if a meritorious party can have no recompence but by the detention of the thing, he shall have a lien to a reasonable extent. If the case of *Binstead v. Buck*, 2 *Black.* 1117, be thought to be against the Defendant's right to a lien, it is to be observed, that it was not necessary for the preservation of the Plaintiff's dog in that case, that the Defendant should keep it as he did; but here, unless *Chapman* had drawn the timber to a place out

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(*a*) The instance here put of an estray does not seem to be parallel with the case in question, since an estray becomes the absolute property of the lord after the proclamations, and a year and a day passed without a claim being made; and this, even

though the owner be under a legal incapacity to claim, as an infant, feme-covert, executrix, prisoner, or beyond sea. 5 *Co.* 107 *b.* and 108 *b.* *Sir Henry Constable's case.*

(*b*) See *Bro. Abr.* tit. Estray and Waif. *pl.* 1. 44 *Ed.* 3. 14.

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of the reach of the tide at high water, it might have been entirely lost.

Cur. advis. vult.

On this day, after consideration, the opinion of the Court was thus delivered by

Lord Chief Justice EYRE. The only difficulty that remained with any of us, after we had heard this case argued, was upon the question whether this transaction could be assimilated to salvage? The taking care of goods left by the tide upon the banks of a navigable river, communicating with the sea, may in a vulgar sense be said to be salvage; but it has none of the qualities of salvage, in respect of which the laws of all civilized nations, the laws of *Oleron*, and our own laws in particular, have provided that a recompence is due for the saving, and that our law has also provided that this recompence should be a lien upon the goods which have been saved (*a*). Goods carried by sea are necessarily and unavoidably exposed to the perils which storms, tempests and accidents (far beyond the reach of human foresight to prevent) are hourly creating, and against which, it too often happens that the greatest diligence and the most strenuous exertions of the mariner cannot protect them. When goods are thus in imminent danger of being lost, it is most frequently at the hazard of the lives of those who save them, that they are saved. Principles of public policy dictate to civilized and commercial countries, not only the propriety, but even the absolute necessity of establishing a liberal recompence for the encouragement of those who engage in so dangerous a service.

Such are the grounds upon which salvage stands; they are recognized by Lord Chief Justice *Holt* in the case which has been cited from Lord *Raymond* and *Salkeld* (*b*). But see how very unlike this salvage is to the case now under consideration. In a navigable river within the flux and reflux of the tide, but at a great distance from the sea, pieces of timber lie moored together in convenient places; carelessness, a slight accident, perhaps a mischievous boy, casts off the mooring rope, and the timber floats from the place where it was deposited, till the tide falls and leaves it again somewhere upon the banks of the river. Such an event as this, gives the owner

(*a*) [Vide *Sutton v. Buck*, 2 Taunt. 302.]

(*b*) 1 Ld. Raym. 393. Salk. 654. pl. 2.

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the trouble of employing a man, sometimes for an hour, and sometimes for a day, in looking after it till he finds it, and brings it back again to the place from whence it floated. If it happens to do any damage, the owner must pay for that damage; it will be imputable to him as carelessness, that his timber in floating from its moorings is found damage-feasant, if that should happen to be the case. But this is not a case of damage-feasance; the timber is found lying upon the banks of the river, and is taken into the possession, and under the care of the Defendant, without any extraordinary exertions, without the least personal risk, and in truth, with very little trouble. It is therefore a case of mere finding, and taking care of the thing found (I am willing to agree) for the owner. This is a good office, and meritorious, at least in the moral sense of the word, and certainly intitles the party to some reasonable recompence from the bounty, if not from the justice of the owner; and of which, if it were refused, a court of justice would go as far as it could go, towards enforcing the payment (a). So it would if a horse had strayed, and was not taken as an estray by the lord under his manorial rights, but was taken up by some good-natured man and taken care of by him, till at some trouble, and perhaps at some expence, he had found out the owner (b). So it would be in every other case of finding that can be stated (the claim to the recompence differing in degree, but not in principle); which therefore reduces the merits of this case to this short question, whether every man who finds the property of another, which happens to have been lost or mislaid, and voluntarily puts himself to some trouble and expence to preserve the thing, and to find out the owner, has a lien upon it for the casual, fluctuating and uncertain amount of the recompence which he may reasonably deserve? It is

(a) It seems probable that in such a case, if any action could be maintained, it would be an action of *assumpsit* for work and labour, in which the Court would imply a special instance and request, as well as a promise. On a *quantum meruit*, the reasonable extent of the recompence would come properly before a jury.

(b) [It is however laid down, that a mere voluntary courtesy will not support an *assumpsit*. *Lampleigh v.*

Braithwaite, Hob. 105; and see the Reporters' note, 3 Bos. & Pul. 251. 1 Saund. 264 (n.) 5th Edit. *ante*, vol. 1. p. 93. According to the civil law the party is entitled to recover, see Wood's Institute, 256, and see Bull. N. P. 45. Whether the finder of goods is bound to take them into his possession, or if taken into his possession to keep them safely, see *Isaak v. Clark*, 2 Bulstr. 312. *Mulgrave v. Ogden*, Cro. Eliz. 219.]

enough

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enough to say, that there is no instance of such a lien having been claimed and allowed; the case of the pointer-dog (*a*) was a case in which it was claimed and disallowed, and it was thought too clear a case to bear an argument. Principles of public policy and commercial necessity support the lien in the case of salvage. Not only public policy and commercial necessity do not require that it should be established in this case, but very great inconvenience may be apprehended from it, if it were to be established. The owners of this kind of property, and the owners of craft upon the river which lie in many places moored together in large numbers, would not only have common accidents from the carelessness of their servants to guard against, but also the wilful attempts of ill-designing people to turn their floats and vessels adrift, in order that they might be paid for finding them. I mentioned in the course of the cause another great inconvenience, namely, the situation in which an owner seeking to recover his property in an action of trover will be placed, if he is at his peril to make a tender of a sufficient recompence, before he brings his action: such an owner must always pay too much, because he has no means of knowing exactly how much he ought to pay, and because he must tender enough. I know there are cases in which the owner of property must submit to this inconvenience; but the number of them ought not to be increased: perhaps it is better for the public that these voluntary acts of benevolence from one man to another, which are charities and moral duties, but not legal duties, should depend altogether for their reward upon the moral duty of gratitude. But at any rate, it is fitting that he who claims the reward in such case should take upon himself the burthen of proving the nature of the service which he has performed, and the *quantum* of the recompence which he demands, instead of throwing it upon the owner to estimate it for him, at the hazard of being nonsuited in an action of trover.

Judgment for the Plaintiff.

(*a*) 2 Black. 1117.

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BOLTON against The Bishop of CARLISLE, the Earl of LONSDALE and SMITH, Clerk.

Monday,
Nov. 25th.

IN this *Quare Impedit*, brought to recover the presentation to the vicarage of *Askham* in the county of *Westmorland*, the declaration after deducing a title in fee, through a variety of conveyances to one *Joseph Fielden*, proceeded thus: "And the said *Joseph Fielden* being so seised of the said advowson with the appurtenances, afterwards, to wit, on the 20th day of *June*, in the year of our Lord 1791, at the parish aforesaid, by a certain other indenture of bargain and sale, therein mentioned to be made between the said *Joseph Fielden*, one *Robinson Shuttleworth*, and one *Elizabeth Tatham* spinster of the one part, and the said Plaintiff of the other part, (one part of which said last mentioned indenture, sealed with the seal of the said *Joseph Fielden* the said Plaintiff brings here into court, the date whereof the same day and year last aforesaid), the said *Joseph Fielden* for the considerations therein mentioned, did bargain and sell unto the said Plaintiff (among other things) the said advowson with the appurtenances, to hold the same unto the said Plaintiff, from the day next before the day of the date of the same indenture, for one whole year then next following, as by the said last mentioned indenture, relation being thereunto had, more fully appears. By virtue of which said last mentioned bargain and sale, and by force of the statute for transferring uses into possession, the said Plaintiff became and was possessed of the said advowson with the appurtenances for the term of one year; and the said Plaintiff being thereof so possessed, afterwards, to wit, on the 21st day of *June*, in the year last aforesaid, at the parish aforesaid, by a certain other indenture then and there sealed with the seal of the said *Joseph Fielden*, and bearing date the day and year last aforesaid, and therein mentioned to be made between the said *Joseph Fielden* of the first part, the said *Robinson Shuttleworth* of the second part, the said *Elizabeth Tatham* spinster of the third part, John

Where in setting forth a conveyance it was stated that a release was cancelled by the seal of the releasor being taken off and destroyed, and that part of the deed was destroyed or lost, with a profert of the residue, it was holden to be good pleading (a). The omitting to state the consideration of a bargain and sale, cannot be taken advantage of on a general demurrer.

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(a) [A deed may be pleaded as lost by time and accident, without profert. *Read v. Brookman*, 3 T. R. 151. See also as to the profert of lost deeds, *Smith v. Woodward*, 4 East,

585. *Hendy v. Stephenson*, 10 East, 55. *Hawley v. Peacock*, 2 Campb. N. P. C. 557. *Paine v. Bustin*, 1 Stark. N. P. C. 74.]

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“ *Hankinson* of the fourth part, and the said Plaintiff of the
 “ fifth part, (*which said last mentioned indenture*, so sealed with
 “ the seal of the said *Joseph Fielden* as aforesaid, afterwards, to
 “ wit, on the first day of *July* in the year last aforesaid at the
 “ parish aforesaid, was cancelled by the said seal of the said
 “ *Joseph Fielden* thereto being then and there taken off from
 “ the same, and destroyed or lost, and the residue thereof the said
 “ Plaintiff now brings here into court,) the said *Joseph Fielden*
 “ for the considerations therein mentioned, did release unto
 “ the said Plaintiff and his assigns (among other things) the
 “ said advowson with the appurtenances, to hold to the said
 “ Plaintiff, his heirs and assigns for ever, to the use of the said
 “ Plaintiff, his heirs and assigns for ever,” &c. &c. The avoid-
 ance was then stated, by the death of *John Cantley*, the last
 incumbent, &c.

[261] The Bishop pleaded the usual plea of disclaimer, and the
 other Defendants demurred specially to the declaration, “ For
 “ that it is not stated or alleged, nor does it appear in or by the
 “ said declaration, for what reason or on what account the said
 “ supposed indenture of release therein lately mentioned was
 “ cancelled, or that the same was re-executed before the said
 “ vicarage became void by the death of the said *John Cantley*,
 “ or that the same hath at any time hitherto been re-executed”,
 &c.

In support of the demurrer, *Cockell*, Serjt., argued as follows:
 Besides the cause of demurrer assigned, the declaration is bad,
 because it sets forth a bargain and sale, without stating the
 consideration of it; for it is a rule of law, that in pleading a
 conveyance deriving its effect from the Statute of Uses, a consi-
 deration must appear, and in a bargain and sale that consider-
 ation must be shewn to be money, according to 1 *Leon.* 170.
Smith v. Lane, *Moore*, 569. *Fisher v. Smith*; and though in
Barker v. Keate, 1 *Mod.* 262. 2 *Mod.* 249. a pepper-corn was
 holden to be a sufficient consideration, yet there it was neces-
 sary to set it forth. A use cannot be raised on a general con-
 sideration, *Mildmay's Case*, 1 *Co.* 176 a.; but the bargainee may
 aver, that money or other valuable consideration was paid or
 given. *Ibid.* 2 *Inst.* 672. And this is a substantial objection,
 which would not be cured by a verdict. Sir *Thomas Raymond*,
 200. *Gulliams v. Munnington*; and therefore it is a ground for
 a general demurrer. It is true, indeed, that in *Stream v. Seyer*,
 1 *Ld.*

1 *Ld. Raym.* 111. *Sargent v. Read*; 2 *Stra.* 1228. 1 *Wils.* 91. this defect was holden to be cured by a verdict, yet in those cases it is said, it would have been fatal on demurrer (a).

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terbury

[HEATH, J. This ought to have been assigned as a cause of special demurrer, for it would have been cured by a verdict. A title defectively set forth is good after verdict, but not a defective title (b): here it is defectively set forth.]

With respect to the cause of demurrer assigned, the Plaintiff ought to have stated how it happened that the deed of release was cancelled by the seal being taken off, in order to excuse the omission of a profert; as the record stands, it appears from his own shewing, that the deed under which he claims, does not exist. If the seal be once severed from the deed, the deed is void, *Bro. Abr. tit. Fails, pl. 27.* 5 *Co.* 22 b. *Matthewson's Case*, 11 *Co.* 28 b. *Pigot's Case*; and in 3 *Bulst.* 79. it is said by *Coke*, Chief Justice, and assented to by *Dodderidge*, that if a deed be lost, the right is lost.

[HEATH, J. A profert is not necessary of a conveyance deriving its effect from the Statute of Uses (c). *Dyer* 277. *Cra. Jac.* 217. 3 *Term Rep. B. R.* 151. *Read v. Brookman*.]

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Lawrence, Serjt., for the Plaintiff. The argument used on the other side, that a pecuniary consideration must be stated in pleading a bargain and sale, is not supported by the cases cited. In *Smith v. Lane*, as it is reported in *Leonard*, the Court doubted, and there was a difference in opinion, and judgment was staid; but it appears from *Lord Buckhurst's Case*, *Moore*, 504. that it was finally adjudged in the same case of *Smith v. Lane*, that "if land be bargained and sold by deed indented and inrolled, without an express consideration of money, the bargainee in pleading shall not be compelled to aver payment of money, because it is apparently implied." But

Supposing the objection to have any foundation, the *stat. 4 Anne*, c. 16. s. 1. directs "that where any demurrer shall be joined, the judges shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto

(a) But this obviously means a special demurrer, though it is not so expressed in the cases cited.

(b) [Vide 1 *Saund.* 228 b. (n). 2 *Saund.* 137 a. (n). 5th edit.]

(c) [See the cases collected in 1 *Saund.* 9 a. (n). See also *Banfill v. Dolph*, 8 *T. R.* 573. *Onslow v. Smith*,

2 *Bos. & Pul.* 387. The reason is because the deeds are supposed to belong to the feoffees, &c. to uses, and that therefore the *cestui que use* has not the power of bringing them into court. But this doctrine has been questioned by conveyancers, see 4 *Cruise Dig.* 128. 3d edit.]

"them,

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“ them, without regarding any imperfection, omission or defect
 “ in any writ, return, plaint, declaration or other pleading,
 “ process or course of proceeding whatever, except those only
 “ which the party demurring shall specially and particularly set
 “ down and express, together with his demurrer, as causes of
 “ the same, notwithstanding that such imperfection, omission or
 “ defect might have heretofore been taken to be matter of sub-
 “ stance, and not aided by the statute made in the 27th year of
 “ Queen *Elizabeth*, &c.” And it goes on to provide, that “no
 “ advantage or exception shall be taken for *default of alleging*
 “ *the bringing into court any bond, bill, indenture or other deed*
 “ *whatsoever*, mentioned in the declaration or other pleadings,
 “ &c.; but the Court shall give judgment according to the very
 “ right of the cause as aforesaid, without regarding any such
 “ imperfections, omissions and defects, or *any other matter of*
 “ *like nature*, except the same shall be specially and particularly
 “ set down and shewn for cause of demurrer.”

[263] With respect to the other objection, *viz.* that the deed had lost its effect by the seal being taken off, the question is, whether the right once vested in the Plaintiff, were divested by the release being so cancelled? That the right was not divested, appears from *Palm.* 403. *Latch.* 226. 2 *Lea.* 113. and in *Gilbert's Law of Evidence* it is said, “ where a thing lies in livery,
 “ a deed formerly sealed may be given in evidence relating to
 “ it, though the seal be afterwards torn off; for the interest
 “ passed by the act of livery that invests the party with the
 “ possession, and the possession that was once transferred by
 “ the deed doth not return back again though the deed was
 “ cancelled, &c. and so if the conveyance was made by lease and
 “ release, and the uses were once executed by the statute, they
 “ do not return back by cancelling the deed”, 109, 110. It is indeed admitted on the pleadings that the estate vested, for the Defendant has not denied the release, which he ought to have done, and taken issue on it. But whether the lease be valid or not, the bargain and sale was for a year, and within the year the church became vacant.

Lord Ch. J. EYRE. I have no doubt on either point made in the argument; the first insisted upon is a matter of form, and ought to have been assigned as a cause of special demurrer, but cannot be taken advantage of on a general demurrer. As to the second, I hold clearly that the cancelling a deed will not divest

divest property which has once vested by transmutation of possession (a); and I would go farther, and say that the law is the same with respect to things which lie in grant. In pleading a grant, the allegation is that the party at such a time "*did grant*"; but if by accident the deed be lost, there are authorities enough to shew that other proof may be admitted: the question in that case is whether the party *did* grant; to prove this the best evidence must be produced, which is the deed; but if that be destroyed, other evidence may be received to shew that the thing was once granted: for God forbid that a man should lose his estate by losing his title-deeds. When I sat in the Court of Exchequer, questions frequently arose on real compositions, in which it was contended that, according to the old opinions, the original deed must be shewn; but though the old books say that a real composition must be by deed, I always held that the production of the deed was not necessary, and that the party might shew that it originally commenced by deed, if the deed were lost.

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GOULD, J. I am of the same opinion with my Lord Chief Justice. A title defectively set forth is a ground of special demurrer; and as to the cancelling the deed, a man's title to his estate is not destroyed by the destruction of his deeds: the case where the seal was ate off by rats, must be in the recollection of every one. It was properly said by my Brother Lawrence, that the Defendant should have pleaded, that the party did not release, upon which an issue might have been taken, and then if the deed had been cancelled by consent of both parties, that perhaps might have been given in evidence, though I much doubt whether even that would have helped him. But in the present case there is a circumstance which plainly shews that the deed was not cancelled by Bolton or the person under whom he claims, with a view to prevent the operation of it, for it is averred that the Plaintiff brings the remaining part of the deed into court.

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HEATH, J. I have already given my opinion, in the course of the argument, on the first point. With respect to the second, as this is a conveyance deriving its effects from the Statute of Uses, all that is averred about the deed being destroyed,

(a) [Vide accord. *Roe d. Berkeley v. Archbishop of York*, 6 East, 90. *Perrott v. Perrott*, 14 East, 431. *Doe*

d. Lewis v. Bingham, 4 B. & A. 677. *Moss v. Mills*, 6 East, 148.]

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is mere surplusage; but if it were necessary, surely no one will say, that if deeds should happen to be stolen, therefore that the owner shall lose his estate.

ROOKE, J. As to the first point, I am of the same opinion. With regard to the second, I think the Defendant ought to have pleaded, and then an issue might have been taken. The case cited from 3 *Bulst.* 79. as it is there reported, is scarcely intelligible, and is very differently stated 1 *Roll. Rep.* 188. (a) where it is as follows. "The deed of a stranger was pleaded, and the Defendant pleaded that the seal was severed from the deed, and so *non est factum*. *Jermin* moved the Court to compel the Defendant to alter the issue, on an affidavit that it was melted with fire by accident, and cited Dr. *Leyfield's* case. And by *Coke* and *Haughton*, this is no cause to compel the Defendant to alter the issue: and here this stranger to the deed cannot plead this special *non est factum*, but ought to plead that nothing passed by the deed." But I agree that a right once vested, is not divested by merely cancelling the deed.

Judgment for the Plaintiff.

(a) There called *Moore v. Waldron*.

[265]

The Earl of BUTE against GRINDALL and Another.

In the Exchequer Chamber, in Error.

Wednesday,
Nov. 27th.

See 1 *Term Rep. B. R.* 338.

The ranger of a royal park is rateable to the poor, in respect of inclosed and cultivated lands in the park, if he is in the enjoyment of the immediate profits of those lands; for as to such profits he is considered as an occupier of the lands (a).

LORD Chief Justice EYRE. The question in this case is, whether the Earl of *Bute* was liable to be rated to the relief of the poor of the parish of *Putney*, in respect of certain lands, in the rate or assessment in the first count of the declaration mentioned. These lands were 199 acres and twelve perches of inclosed lands, being meadow and arable, parcel of *Richmond Park*, and 39 acres 1 rood and 32 perches of land, also parcel of the park, but open to park pasture, and not

(a) [Vide *Rex v. Brown*, 8 East, M. & S. 317; *Rex v. Trent Navigation*, 528; *Rex v. Bishop of Rochester*, 4 B. & C. 57.]
12 East, 353; *Rex v. Bradford*, 4

inclosed.

inclosed. There was a feigned issue to try this question, and another question respecting the herbage and pannage of the park, but this last question being disposed of, I need not state it more particularly. On the trial of the cause, a special verdict was found, stating a grant to Lord *Bute*, by the King's letters patent, of the office of ranger and keeper, and of the custody of *Richmond Park*, and of the preservation of the houses, lodges, edifices, walks, deer, wild beasts and game in the park, to be exercised by him or his deputy, during the king's pleasure. The herbage and pannage of the park, over and above the keeping the game, browse wood, decayed timber, timber for repairs, and for inclosing and beautifying, the liberty of planting trees against the wall, and all other wages, fees, profits, rights, perquisites, commodities, advantages and emoluments, to the said office belonging or appertaining, or of right taken or usually enjoyed with the office, are also granted by the said letters patent, in as large, ample and beneficial a manner, as the Princess *Amelia*, or any former ranger had enjoyed them, without account to his majesty. There are then huddled into this special verdict, without farther introduction, several circumstances of fact, shewing in what manner the lands, which are the subject of the assessment, had been, both before and during Lord *Bute's* rangership, cultivated, partly at the expence of the king, and partly at the expence of the ranger, and how the profits of them had been taken, partly by the king, and partly by the ranger, followed up by a finding, that the profits arising from these lands to the ranger, were worth 100*l.* a year. The special verdict has not found directly, one way or the other, who was the occupier of these lands, nor that the profits which are found to have arisen to the ranger, were profits appertaining to his office of ranger, or even that the custody or possession of these lands did belong to his office of ranger, or that they ever had belonged to it.

Upon this loose and inaccurate statement in the special verdict, the question is reserved, Whether Lord *Bute* was liable to be rated and assessed to the poor, in respect to these lands? If Lord *Bute* had been found to be the occupier of the lands, there would have been no room for a question respecting his liability to this assessment; on the other hand, if he was not the occupier, whatever might be his connexion with the occupier

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occupier short of joint occupation, if for instance, he was only a servant to the occupier, it seems that according to the current of the authorities, and the case of *Milward v. Caffin* in particular, (2 *Black. Rep.* 1330.) he was not liable to be assessed in respect of these lands. The not finding this fact of occupation directly and plainly one way or the other, created a difficulty in my mind, and I believe with some of the other judges. This occasioned the cause to stand over, and as we were not till very lately pressed to give judgment in it, I had concluded, especially after the death of Lord *Bute*, that the cause was at an end.

But being now called upon, we who heard the argument, being a *Quorum* of the Court of Error, have thought it right to give judgment, without putting the parties to the expence and delay of another argument before a full Court, and we are at length come to this conclusion, that though this special verdict is extremely loose and inaccurate, an occupation of these lands sufficient to support this assessment may be collected from it. The finding upon which we rely, is *that the profits arising to the ranger from the whole of the said inclosed lands are worth 100l. a-year.* If these profits arose to the ranger from these lands, during the rangership of Lord *Bute*, they arose to Lord *Bute*, and if they arose to him *et ratione* as ranger, we must understand them to be the *profits of land appertaining to his office of ranger.* Having them by a title, and *virtute officii*, they arise to him immediately, and we think it may be stated as a general proposition, *that the immediate profits of land* (some mines excepted) are a proper subject of assessment, or, to speak more correctly, *that the person who is in the possession*

[267] *of the immediate profits of land may be taxed to the relief of the poor*, in respect of those immediate profits: that *quoad* these immediate profits of the land, *he is an occupier* of the land, within the meaning of those authorities which have decided that the occupier only can be assessed to the relief of the poor. The case of *Rowls v. Gell*, *Cowp.* 451, is in its principle an authority for this doctrine. There the lessee under the crown of lead mines, was holden to be rateable to the poor, for the profits arising from lot and cope, lot being the 13th dish or measure of lead-ore got and made merchantable by the adventurers, and cope being 6d. for every nine dishes of lead-ore raised by those adventurers. Lord *Mansfield* in giving judgment

judgment observed, that in general the farmer or occupier of the land, and not the landlord, was liable to the poor-rate: that the landlord was never assessed for his rent, because that would be a double assessment, as his lessee had paid before, but that if there were profits to the landlord which were a proportion of the profits of the land, for which the tenant had not been assessed, there was no reason to exempt these proportionable revenues from this tax; and it was holden that he was liable to be rated for this property. In that case, strictly speaking, the lessee of the lead-mine was landlord, and not occupier, but he was considered as occupier *quoad* those profits, for the purpose of an assessment to the relief of the poor. He was in the possession of profits arising immediately from the land, he was an occupier of the profits of the land, and as such, rateable: so was the Earl of *Bute* in the case which now stands for judgment before us. We are therefore of opinion that this judgment ought to be affirmed.

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Judgment affirmed.

The Earl of LONSDALE *against* LITTLEDALE.

Wednesday,
Nov. 27th.

In the *Exchequer Chamber*, in Error.

[2 *Anstr.* 356. *S. C.* *Vide post.* 299. *S. C. in Dom. Proc.*]

THE Defendant in error, filed a bill in the Court of *King's Bench*, against the Plaintiff, and recovered a verdict, the cause of action being the following.

Qu. Whether a peer of parliament may be sued in the Court of *King's Bench*, by bill? (a).

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“ Be it remembered, that in *Easter Term* last past, before our lord the king at *Westminster*, came *Henry Littledale* by *Anthony Adamson* his attorney, and brought in the court of our said lord the king then there, his bill against the Right Honorable *James Earl of Lonsdale* having privilege of parliament, of a plea of trespass on the case, and there are pledges for the prosecution, to wit, *John Doe* and *Richard Roe*; which said bill

(a) [Vide 3 *Boa. & Pull.* 9 b. 12 a. *Tidd's Pr.* 115. 8th Ed. Where a peer was sued jointly with others by bill of *Middlesex*, the Court of *K. B.* set aside the proceedings as against the peer, *Briscoe v. Earl of Egremond* and others, 3 *M. & S.* 88.

But where an Irish peer was sued by bill, the Court of Common Pleas refused to set aside the proceedings on motion, but left him to plead his privilege in abatement, *Davis v. Lord Rendlesham*, 7 *Taunt.* 679; 1 *B. Moore*, 410, *S. C.*]

1793. follows in these words, to wit, *Cumberland* to wit, *Henry Little-*
 Earl of *Lonsdale* complains of the Right Honourable *James Earl of Lons-*
 LONSDALE *dale*, having privilege of parliament, in a plea of trespass on the
 against
 LITTLEDALE case, &c., for that whereas the said *Henry*, on the first day of
 in Error. *January* in the year of our Lord 1789, and long before, was
 and from thenceforth continually hitherto hath been, and still
 is seised in his demesne as of fee, of and in a certain messuage
 or dwelling-house, with a coach-house, stable, out-houses, build-
 ings, yards, and gardens, to the said messuage or dwelling-
 house belonging, with the appurtenances, situate and being at
 the parish of *Saint Bees* in the said county of *Cumberland*; and
 whereas also the said Earl during all the time aforesaid, was
 lawfully possessed of all the mines and seams of coal lying
 under the said messuage and premises of the said *Henry*, and
 also of a certain other coal-mine, situate and being under cer-
 tain other lands in the parish of *Saint Bees* aforesaid: and
 whereas also before and at the time of committing the griev-
 ance next hereinafter mentioned, there was a certain large
 mine of coal, extending as well under the aforesaid premises of
 the said *Henry*, as under other houses, lands and tenements, at
 the parish aforesaid, contiguous and near thereto, which same
 mine had before that time been dug and worked, and then, and
 for a long time before, had large quantities of water confined
 therein, which could not be emptied or discharged therefrom,
 in the manner hereafter mentioned, without greatly endangering
 the earth, soil and ground over the same, and the houses,
 buildings and premises thereon erected and being; yet the
 said Earl, contriving and wrongfully intending to injure and
 damnify the said *Henry*, and to disturb him in the peaceable
 and quiet possession, occupation and enjoyment of the said
 messuage and premises, and to damage and destroy the same,
 whilst the said *Henry* was so seised of his said messuage and
 premises as aforesaid, and whilst the said Earl was so possessed
 of his said mines and seams of coal, and the said other coal-
 mine as aforesaid, to wit, on the second day of *January* in the
 year of our Lord 1789, and on divers other days and times,
 between that day and the day of exhibiting the bill of the said
Henry against the said Earl, in this behalf, at the parish of
 [269] *Saint Bees* aforesaid, cut, dug, worked and made, and caused to
 be cut, dug, worked and made, certain drifts from and out of his
 last mentioned coal-mine, and in so doing, so negligently, in-
 cautiously

cautiously and improvidently conducted, managed and carried out the same, that the said Earl for want of due care and caution of himself or his agents, and servants, in that behalf, on the 31st day of *January* in the year of our Lord 1791, at the parish aforesaid, negligently, incautiously and improvidently, pierced, dug and broke into the aforesaid mine, which had been dug and worked, and had water confined therein as aforesaid, whereby the water, which was then and there confined therein as aforesaid, was suddenly and hastily let out, emptied and discharged therefrom, and with great force, violence and rapidity rushed and was carried along and through the same mine, and from and out of the same, through and along the said drifts; and the support of the said messuages and premises of the said *Henry*, and of the earth, soil and ground, upon which his said messuage, stables, out-houses and buildings were erected, standing and being as aforesaid, over and above the same mine so having water confined therein as aforesaid, was thereby then and there greatly damaged, weakened, removed and destroyed: by reason whereof, part, to wit, ten square yards of the earth and soil of the said *Henry*, of his said garden, hath sunk and fallen to a great depth, to wit, to the depth of one hundred fathoms, into the said mine so dug and worked under the same as aforesaid, and other the earth and soil of the said *Henry* of his garden and yards and also the earth and soil upon which his said messuage, coach-house, stables, out-houses and buildings were erected and built, have greatly shrunk, cracked, rent and given way, and his said messuage, coach-house, stables, out-houses and buildings, have been and are very much cracked, rent, shaken, weakened and damaged, and in great danger of falling, and rendered unfit and dangerous for use or habitation, and the walls, to wit, forty perches of the walls of the said garden, and forty perches of the walls of the said yards of the said *Henry*, have fallen down, and are destroyed, and the residue of the walls of the said garden and yards, are greatly shaken, rent, weakened and damaged, and in great danger of falling, and all the said messuage and premises of the said *Henry* are thereby greatly diminished in value, and become of very little use or value to him the said *Henry*, by reason of which said several premises, the said *Henry* was forced and obliged to remove himself and his family, and also his goods, furniture and effects, and hath

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accordingly removed himself and his family, and his goods, furniture and effects, from and out of his said messuage or dwelling-house, and other his premises, for their safety and preservation, and hath been obliged to lay out and expend, and hath actually laid out and expended, a large sum of money, to wit, the sum of 100*l.* in the removal of his said goods, furniture and effects as aforesaid, and in procuring other places for the abode of himself and his family, and the reception of his said goods, furniture and effects, and in and about the preserving of his said messuage and premises, and preventing the same from falling or receiving further damage; and the said goods, furniture and effects, in and by reason of such removal, were part thereof, being of great value, to wit, of the value of 100*l.* purloined and lost, and the residue thereof of great value, to wit, of the value of 1000*l.* very much damaged, broken, spoiled and destroyed, to wit, at the parish of *Saint Bees* aforesaid." (a)

There were also several other counts, somewhat varying in their statement of the mode of working the mines, and of the injury received. A writ of error being brought, after the usual errors, the assignment was, "that the said Earl being a peer of "this realm ought to have been sued by *original writ*, and not "by *bill*." And now, on behalf of the Plaintiff in error, *Williams* in support of that assignment made two questions; the first, whether a peer or lord of parliament could be sued in the Court of *King's Bench* by bill prior to the passing the statute 12 & 13 *W. 3. c. 3*? The second, whether that statute had made any alteration in this respect? 1. Before that statute a peer could only be sued by original. By the antient common law, that court had no jurisdiction of civil suits except in cases of trespass *vi et armis*; and in such the party might be arrested. 3 *Co. 12 a.* But in the course of time it was holden that when the Defendant was once in custody of the Marshal, he might be sued for any other cause of action by bill. Thus Lord *Coke* says, "This court hath power to hold plea by bill, for "debt, detinue, covenant, promise, and all other personal "actions, *ejectione firmæ*, and the like, against any that is in "custodiâ mareschalli, or any officer, minister or clerk of the "court: and the reason hereof is, that if they should be sued "in any other court, they should have the privilege of this "court: and lest there should be a failure of justice (which is

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(a) [See the observations of *Eyre*, C. J., in *Bush v. Steinman*, 1 *Boa. & Pull.* 407.]

" 30

“ so much abhorred in law) they shall be impleaded here by
 “ bill, though these actions be *Common Pleas*, and are not re-
 “ strained by the said act of *Magna Charta* ; 4 *Inst.* 71.” and
 again, “ it is observable, that putting in bail at one man’s suit
 “ he was in *custodiâ mareschalli* to answer all others which
 “ would sue him by bill, and this continueth to this day. If
 “ any person be in *custodiâ mareschalli*, &c., be it by commit-
 “ ment, or by *latitat*, bill of *Middlesex* or other process of law,
 “ it is sufficient to give the court jurisdiction. 4 *Inst.* 72.” In
 3 *Black. Comm.* 42. it is thus laid down, “ on the plea side, or
 “ civil branch, it has an original jurisdiction and cognisance of
 “ all actions of trespass, or other injury alledged to be com-
 “ mitted *vi et armis*, of actions for forgery of deeds, mainte-
 “ nance, conspiracy, deceit, and actions on the case which
 “ alledge any falsity or fraud ; all of which savour of a criminal
 “ nature, although the action is brought for a civil remedy,
 “ and make the Defendant liable in strictness to pay a fine to
 “ the King, as well as damages to the injured party. The
 “ same doctrine is also now extended to all actions on the case
 “ whatsoever. But no action of debt or detinue or other mere
 “ civil action, can by the *Common Law* be prosecuted by any
 “ subject in this court, by original writ out of *Chancery* ; though
 “ an action of debt given by *statute*, may be brought in the
 “ *King’s Bench* as well as in the *Common Pleas*. And yet this
 “ Court might always have held plea of any civil action, (other
 “ than actions real,) provided the defendant was an officer of
 “ the court, or in the custody of the Marshal or prison-keeper
 “ of this court, for a breach of the peace, or any other offence.
 “ And in process of time, it began by fiction, to hold plea of
 “ all personal actions whatsoever, and has continued to do so
 “ for ages ; it being surmised that the Defendant is arrested for
 “ a supposed trespass, which he never has in reality committed ;
 “ and being thus in the custody of the Marshal of this court,
 “ the Plaintiff is at liberty to proceed against him for any
 “ other personal injury : which surmise, of being in the Mar-
 “ shal’s custody, the Defendant is not at liberty to dispute.”

The proceeding by bill was indeed originally designed only
 for injuries committed with force to the person or property of
 another. The party to whose person or property any injury
 accompanied with force had been committed, had liberty to
 apply to the Court of *King’s Bench* for redress, and, in order
 that.

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that process might be awarded to bring the offender into court, *the Plaintiff drew out his complaint, and entered it at length on the records of the Court, in which a trespass was alleged, in order to give the Court jurisdiction. *Trye*, 98. When this was done, the clerk of the court was warranted to issue the bill, the only process awarded in the first instance. This bill was directed to the sheriff of that county where the Court happened to sit, commanding him to take and safely keep the Defendant, so that he might have the body before the King at a certain day, to answer to the Plaintiff in a plea of trespass. If *Non est inventus* was returned, and the Defendant was in another county, the Plaintiff might sue a *testatum* bill or *latitat*, and when the Defendant was taken and brought into court, he was either delivered to the actual custody of the Marshal, or admitted to bail.

It is clear, therefore, that at common law, the Court of *King's Bench* could hold plea by bill in no instance, except where the Defendant was in the actual or supposed custody of the Marshal (a). But as a Peer or Lord of Parliament could not be legally arrested in a civil suit, he could not in reality be in the custody of the Marshal; and as he could not be so really, the fiction could not extend to him. That he could not be arrested, is plain from many authorities. Thus, in the *Countess of Rutland's* case, 6 Co. 52. it was resolved, that the person of a Baron, who is a Peer of Parliament, shall not be arrested in debt or trespass. In the *Earl of Shrewsbury's* case, 9 Co. 49 a. it is said, "The law gives them (meaning Earls) high and great privileges; and therefore their bodies shall not be arrested for debt, trespass, &c. because the law intends that they assist the king with their counsel for the commonwealth, and keep the realm in safety by their prowess and valour." In *Mackalley's* case, 9 Co. 68 a. it is holden, that "if a *Capias* be awarded against a Baron or other Peer of the realm, it is erroneous, because their bodies are by law privileged from arrest." So in *Foster v. Jackson*, *Hob.* 61. it is laid down in trespass *vi et armis*, at

(a) It seems from Bro. Abr. tit. Bill. pl. 6. that, anciently, if a person who was neither in the custody of the Marshal nor an officer of the court, were sued in the *King's Bench* by bill, he might give the Court jurisdiction in the suit by pleading voluntarily, though he was not bound to plead. The passage is as follows, "Nota,

"per *Cheney*, home n'avera bill in
 "Banco Regis vera. auter, nisi de-
 "fendens soit prisoner al court tem-
 "pore, &c. vel officer, ut videtur;
 "quare s'il ne soit prisoner il n'est
 "tenus de responder a un bill, mes il
 "poit responder gratis s'il voit, et c'est
 "bon."

"the

“ the common law, against a Baron, a *Capias* lieth not, nor
 “ after, by equity of the common law upon the statute (a), be-
 “ cause the estate of a Baron is *intended sufficient.” In 1
Ventr. 298. a bill of *Middlesex* “ was issued by an attorney
 “ against the Countess of *Huntingdon*, which was discharged
 “ by *Supersedeas*, without pleading, because it appeared by the
 “ record that she was a Peeress, and the attorney was com-
 “ mitted for suing out the process.” And in a note, *Lilly’s*
Entries, 21. it is said, “ a Peer cannot be sued in the *King’s*
 “ *Bench* by bill, by reason he is therein alleged to be in the
 “ custody of the Marshal.”

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2. It remains then to be seen, whether by the statute 12 & 13
W. 3. c. 3. Peers are made liable to the process by bill, from
 which they are exempted by the common law. In the first
 section, a power is given to sue all persons alike having privi-
 lege of Parliament immediately after the dissolution or proro-
 gation, or after an adjournment for a longer time than fourteen
 days. But in the second section, there is a distinction esta-
 blished in the mode of suing Peers, and members of the House
 of Commons. In that clause, it is enacted, that “ if any per-
 “ son or persons having cause of action or complaint against
 “ any Peer of this realm, or Lord of Parliament, such person
 “ or persons after any dissolution, prorogation, or adjournment,
 “ as aforesaid, or before any session of parliament, or meeting
 “ of both houses as aforesaid, shall and may have *such process*
 “ out of his Majesty’s courts of *King’s Bench*, *Common Pleas*,
 “ and *Exchequer*, against such Peer or Lord of Parliament, as
 “ he or they might have had against him out of the time of pri-
 “ vilege.” Now the only process which the Plaintiff could
 have had against a Peer, out of the time of privilege, was an
 original, (it having been before shewn that he could not have a
 bill,) for in the time of privilege he could have had no process
 at all, and it was to remedy the mischief which arose from the
 debtors being protected by the privilege of parliament, in the
 intervals when parliament was not sitting, that the statute was
 made. But with respect to the House of Commons, in the
 same clause it is enacted, “ that if any person or persons have
 “ cause of action against any of the said knights, citizens,
 “ or burgesses, or any other person intitled to privilege of
 “ parliament, after any dissolution, prorogation, or adjourn-

(a) 25 *Ed. 3. st. 5. c. 17.*

“ ment

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“ ment as aforesaid, or before any sessions of parliament, or
“ meeting of both Houses as aforesaid, such person or persons
“ shall and may *prosecute such Knight, Citizen or Burgess*, or
“ other person intitled to such privilege of parliament in his
“ Majesty’s Courts of *King’s Bench, Common Pleas and Ex-*
“ *chequer*, by summons and distress infinite, or *by original bill*
“ and summons, attachment, and distress infinite,” &c. The
statute, therefore, directs, that Peers shall be sued by the *same*
process to which they were liable out of the time of privilege,
but members of the House of Commons, either by summons
and distress infinite, *or by original bill*, summons, attachment,
and distress infinite. And it is remarkable, that when this act
went to the House of Lords for their concurrence, they ex-
punged a part of the clause in question which gave the same
process of *original bill and summons* against them, as against
the members of the House of Commons, and sent the act
amended back to the House of Commons, where it passed
with the amendment. *Journals of the House of Commons, vol.*
13. p. 567. which plainly shews, that the intent of the Legis-
lature was not to give any new process against Peers, by mak-
ing them subject to the original bill, as well as the members of
the House of Commons. And though after Knights, Citizens,
and Burgesses, the statute mentions *other persons* intitled to
such privilege, yet those words cannot be construed to include
Peers, it being a rule of construction not to go back from the
inferior to the superior; thus the statute 13 *Eliz. c. 10.* which
mentions only deans and chapters and other inferior ecclesias-
tical persons, is holden not to extend to bishops (a). If, in-
deed, the cases of *Say v. Lord Byron, Sayer, 63.* and *Gosling v.*
Lord Weymouth, Cowp. 844. be cited on the other side, it is
hoped that the Court will not be bound by them, as the present
writ of error is brought to obtain a review of these cases, and
it is a maxim of law, *non potest adduci exceptio ejusdem rei,*
cujus petitur dissolutio.

Holroyd, who was going to argue on the other side, was
stopped by the Court, and the

Judgment was affirmed (b).

This case is now depending in the House of Lords. [Vide *post.* 299.]

(a) It was not necessary that the
13 *Eliz. c. 10.* should extend to bi-
shops, who were already restrained
from granting leases for more than

21 years, or three lives, by 1 *Eliz. c.*
19. s. 5

(b) As other errors were assign-
ed, besides that which was made the
subject

subject of argument, there was enough on the record to intitle the Court of Exchequer Chamber to give judgment; but that court could not mean to decide the question that was ar-

gued, the *Statute 27 Eliz. c. 8. s. 2.* having expressly excepted "errors to be assigned or found, for or concerning the jurisdiction of the said Court of King's Bench."

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Ex parte WORSLEY.

Thursday,
Nov. 28th.

LAURENCE, Serjt., moved to pass a recovery at the bar, the affidavit of the acknowledgment of the warrant of attorney having been taken at *Gibraltar*, before a magistrate of that place, but not attested by a notary-public; and in support of his motion, he mentioned that last term, in the case of the affidavits of an acknowledgment taken before Lord *Carleton*, the Lord Chief Justice of the Common Pleas in *Ireland*, the Court dispensed with the attestation of a notary, on an affidavit that the signature was in his Lordship's hand-writing. But

The affidavit of the acknowledgment of a warrant of attorney to suffer a recovery taken before an ordinary magistrate in a foreign country, must be attested by a notary-public. But the Court will dispense with such attestation, in the case of an affidavit taken before a great judicial officer in *Ireland* (a).

The Court said, that though by the courtesy which subsisted between the two countries, they would take judicial notice that so great an officer as the Chief Justice of a superior court in *Ireland* was competent to administer an oath, and therefore would be satisfied with a verification of his hand-writing, yet there was a great difference with respect to an ordinary magistrate, and that in such cases, the rule requiring the attestation of a notary-public, ought to be strictly observed. On hearing this, *Lawrence* took nothing by his motion.

(a) [See *Dalmer v. Barnard*, 7 T. R. 252. that it is the constant practice for the judges here to receive affidavits sworn before the judges of *Scotland* and *Ireland*. Where the warrant of attorney is acknowledged in a place very distant from the residence of any notary-public, or Bri-

tish magistrate, an affidavit of the acknowledgment made before a British consul, or agent there, will suffice, *Domville v. Collier*, 3 Taunt. 275. Vide R. M. 39 Geo. 3. 1 Bos. & Pul. 362. *French v. Belew*, 1 M. & S. 303.]

END OF MICHAELMAS TERM.

CASES

C A S E S

ARGUED AND DETERMINED

1794.

IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER CHAMBER,

IN

Hilary Term,

In the Thirty-fourth Year of the Reign of GEORGE III.

ROLFE against STEELE.

*Friday,
Jan. 24th.*

A *TESTATUM Capias* issued into *Surrey* returnable the first return of last *Michaelmas* Term, *viz.* Nov. 3. On the 6th of Nov. the Sheriff was ruled to return the writ. On the 12th he returned *cepi corpus*: on the 13th he was ruled to bring in the body. On the 21st an attachment issued. On the 23d of *January*, the first day of *Hilary* Term, a motion was made on the part of the Sheriff, to set aside the attachment as irregular, because the rule to bring in the body had issued a day before the time was out for the Defendant to put in his bail; for the writ being returnable the first return of *Michaelmas* Term, and it being a country cause, the Defendant had eight days after the first day of full term, *i. e.* after the *4to die post*, to put in bail (b), and the Sheriff being only liable in default of the Defendant, he ought not to be ruled to bring in the body till the time for putting in bail was expired.

An attachment against the Sheriff is irregular, if the rule to bring in the body issues before the time for putting in bail has expired (a). But if the Sheriff neglect to apply to the Court in due time, to set aside the attachment, the irregularity is waived. Where a writ is returnable the first return of a

The Court were of opinion that the attachment was irregular,

term, in a country cause, the Defendant has eight days after the *4to die post*, to put in bail.

(a) [Acc. *Rex v. Sheriff of Middlesex*, 8 East, 525. Tidd's Pr. 311. 8th edit.]

(b) Consequently he might have put them in on the 14th of November.

the

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ROLFE
against
STEELE.

the rule to bring in the body having issued too soon. But as a week had elapsed in *Michaelmas* Term after the attachment issued, without any application to set it aside, and during that time the Sheriff and the Plaintiff had frequent communications together, it was holden that the irregularity was waived; and therefore the

Rule was discharged.

Le Blanc, Serjt., for the Sheriff; *Cockell*, Serjt., for the Plaintiff.

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Executors
are not liable
to costs, on
a judgment
as in case of
a nonsuit,
under the
statute 14
Geo. 2. c.
17(a).

BOOTH and Others, Executors, *against* HOLT.

THE Defendant had obtained a rule for judgment as in case of a nonsuit, under the *stat.* 14 Geo. 2. c. 17. the Plaintiffs not having proceeded to trial in due time after issue joined; which rule was made absolute, and judgment as in case of a nonsuit entered. And now a rule was granted to shew cause why it should not be referred to the prothonotary to tax the Defendant his costs; against which *Le Blanc*, Serjt., shewed cause, insisting that as this was an action brought by executors for a debt due to the testator, they were not liable to costs on a judgment as in case of a nonsuit on the statute, any more than they would have been if they had been nonsuited at the trial. The directions of the statute are, “that all judgments given by
“virtue of that act shall be of the like force and effect as judgments upon nonsuit, and of no other force or effect”: and
“that the Defendant or Defendants shall, upon such judgment,
“be awarded his, her or their costs in any action or suit where
“he, she or they would upon nonsuit be intitled to the same,
“and in no other action or suit whatever.” And this point has been already decided. *Barnes*, 130(b). *Howard v. Radburn*, 4 Burr. 1928. *Bennet v. Coker*, Bull. N. P. 332.

Cockell, Serjt., *contra*, in support of the rule. The Plaintiffs were guilty of laches, and where there is laches in executors they are liable to costs. Thus on a *non-pros* they are so liable. 3 Burr. 1584. *Harwes v. Saunders*. So also on a discontinuance. 3 Burr. 1451. *Harris v. Jones*. And the principle is the same in one case of laches as in another.

(a) [Vide *Higgs v. Warry*, 6 T. R. 654. *Shaw v. Mansfield*, 7 Price, 709. Tidd's Pr. 830. 8th edit.]

(b) Last edit. [Willes, 316. S. C.]

But

But the Court held clearly, that the Plaintiffs were not liable to costs, the words of the statute being so strict as to preclude all argument from principle.

Rule discharged.

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Tuesday,
Jan. 28th.

DE LA COUR *against* READ.

THIS was an action of debt upon a judgment by default (b) in which the Defendant was holden to bail, though he had brought a writ of error. He had been likewise holden to bail in the original action, on an affidavit that he was indebted to the Plaintiff as acceptor of three bills of exchange; but the Plaintiff declared against him in covenant. Upon which, on application to the Court, he was discharged on entering a common appearance, on the ground that the Plaintiff had declared on a different cause of action from that mentioned in the writ and affidavit. The Defendant now applied, by *Le Blanc*, Serjt., to be discharged on entering a common appearance, upon the ground that having been arrested and holden to bail in the original action, he ought not to be holden to bail in an action on the judgment. *Sayer*, 43. *Newton v. Swymmer*, 160. *Bower v. Bewett*, 2 *Stra.* 1039. *Hall v. Howes*, 2 *Wils.* 93. *Crutchfield v. Seyward*.

The Defendant, having been holden to bail, but afterwards discharged on a common appearance, on account of the Plaintiff declaring against him on a different cause of action from that mentioned in the writ and affidavit, may be again holden to bail in an action on the judgment (a).

Lawrence, Serjt., shewed cause. The Defendant having been discharged, on a common appearance in the original action, the Plaintiff has no bail; and this being a judgment by confession there are no bail in error, which distinguishes this case from that in 2 *Wils.* 93. where there was a verdict, and therefore might have been bail in error. And

The Court, in the absence of the Lord Chief Justice, held that the Plaintiff having lost his bail in the original action, though by declaring in a different form of action, was in the same situation as if he had not holden the Defendant to bail at all, and therefore might hold him to bail in an action on the judgment.

Rule discharged (c).

(a) [In general a Defendant cannot be arrested in an action on a judgment if he was arrested in the original action. *Crutchfield v. Seward*, Barnes, 116. 1 *Chitty's Rep.* 274.(n). See also *Imley v. Ellefsen*, 3 *East*, 309. *Tidd's Pr.* 174, 175.]

(b) The default was in not producing the record, on a plea of a judgment recovered, and a replication of *Nul tiel record*.

(c) But see Barnes, 376. *Wright v. Kerswill*, *Stra.* 792. *Chambers v. Robinson*, *Cowp.* 72. *Blandford v. Foot*.

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Tuesday,
Jan. 28th.

CHAPMAN and Others, Assignees of KENNET a Bankrupt, against GARDNER.

A bankrupt who has obtained his certificate is not a competent witness to prove the debt of the petitioning creditor, or any other fact necessary to support the commission (b).

ASSUMPSIT on several promissory notes given by the Defendant to the bankrupt. Plea, *Non assumpsit*. At the trial at *Guildhall*, the Plaintiffs, to make out their title as assignees, called the bankrupt, who had obtained his certificate, as a witness to prove the debt of the petitioning creditor: but it was objected by the counsel for the Defendant, that he was not a competent witness to prove his own petitioning creditor's debt, or any other fact necessary to support the commission, on which his certificate and discharge from his prior debts depended. This objection the Lord Chief Justice over-ruled, and admitted the evidence, and a verdict was found for the Plaintiff. A new trial being moved for by *Le Blanc*, Serjt., on the ground that the evidence was not admissible, the rule was afterwards made absolute without argument, the Court being clearly of opinion, in which the Lord Chief Justice concurred, that the bankrupt could not be admitted to prove any of the facts necessary to support the commission.

Rule absolute (a).

(a) *Cross v. Fox*, at *Guildhall*, *Michaelmas*, 5 Geo. 2. before Lord *Raymond*, Chief Justice.

In an action brought by the assignees of a bankrupt, the Plaintiff, in order to prove the petitioning creditor's debt, produced the bankrupt himself, to whom Mr. *Fazakerly* objected, and the Chief Justice agreed, that as the bankrupt himself could not be a witness to prove his own act of bankruptcy, so he could not be a witness for this purpose; because the establishing and fixing the debt of the petitioning creditor, goes to support the commission itself, and it is for the benefit of the bankrupt that the commission should be in force; and the Plaintiffs were nonsuited.

Flower and Others v. Herbert, before Sir *Dudley Ryder*, Chief Justice, at *Guildhall*, December 17th, 1754.

Two issues were directed by the Court of Chancery, to try first, whether at and before the issuing the commission of bankrupt against the Defendant and *William Eylon*, the Defendant was a bankrupt, within the true intent and

(b) [See *Wyatt v. Wilkinson*, 5 Esp. N. P. C. 187. that a bankrupt cannot be asked questions with a view to establish a prior act of bankruptcy. If the Defendant calls the bankrupt as a witness, it has been held that he waives all objections to his compe-

tency, and the bankrupt may be cross-examined as to the requisites of bankruptcy. *Fletcher v. Woodmas*, Selw. N. P. 253. (n). 4th edit.; but this case has been over-ruled. See *Bian v. Tetley*, 1 M'C. & Y. 397. where all the authorities are considered.]

meaning

meaning of the statutes concerning bankrupts, or either of them: and secondly, whether at the time of issuing the commission, the Defendant and *Eyton* were indebted to *Henkell* the petitioning creditor in 100*l.*? *Eyton* having obtained his certificate, the Defendant's counsel objected to his competency as a witness, because he was interested to support his certificate, which would be void if the commission improperly issued, and the commission would have issued improperly if *Herbert* was not a bankrupt as well as *Eyton*.

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Lord Ch. J. *Ryder*. This is a question I do not remember ever to have been made before: I think *Eyton* is not admissible as a witness, either to shew that he and *Herbert* were joint debtors to the petitioning creditor, or that they were partners, or that *Herbert* was a bankrupt; for either of these facts tend to support the commission, which must unavoidably be superseded, if these facts were otherwise: and if this be not a good commission, as it will not be unless it be good against both, then the certificate will become void, and *Eyton*, in consequence, be liable again to his debts from which this certificate would discharge him; for the certificate is as a release, which the releasee can never be allowed as a witness to affirm. It is a settled rule, and so agreed on all sides, that a bankrupt after his certificate is obtained, may be a witness to any thing relating to the bankruptcy, except only to the act of bankruptcy; but then he is not admitted directly to support the commission, but to prove other matters (a).

(a) [See the observations of Mr. *Phillipps* upon this and the above case, *Treatise on Evidence*, 335. 6th edit. where he remarks, that if they are to be followed, they must be con-

sidered as anomalous exceptions to the general rule which is uniformly adopted on the subject of interested witnesses. See also 3 *Starkie*, N. P. C. 59 (n).]

JORDAINE and Others *against* SHARPE.

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Jan. 28th.

A RULE was granted to shew cause why there should not be judgment as in case of a nonsuit, the Plaintiff not having proceeded to trial in due time after issue joined. The affidavit on which the motion was grounded, stated also that the Plaintiff had given notice of trial, and had not countermanded it, but had entered the cause for trial, and withdrew the record after it was called on, by which the Defendant had been put to the expence of witnesses, briefs, &c. Sufficient cause being shewn, the Court discharged the rule, on a peremptory undertaking of the Plaintiff to try the cause at the sittings after this

Where the Plaintiff does not countermand notice of trial, but withdraws the record, after the cause is called on, the Court will make it a condition of discharging a rule for judgment as in case of a

nonsuit, (on a peremptory undertaking to try,) that he shall pay the Defendant the costs incurred by the omitting to try, though the practice of the Court is not to grant a rule for costs for not going on to trial, and also a rule for judgment as in case of a nonsuit, at the same time (a).

(a) [But in K. B. a rule for costs for not proceeding to trial may be obtained after a rule for judgment, as

in case of a nonsuit, has been discharged, *Thomas v. Williams*, 4 B. & C. 260.]

term,

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term, and on payment of the Defendant's costs, on account of the cause not being tried. This latter part of the rule was opposed on the part of Plaintiff, and it was insisted that by the practice of this court, the Plaintiff could not have a rule for costs for not going on to trial, and a rule for judgment as in case of a nonsuit at the same time. But on consulting the Prothonotary, who said he had often taxed costs in similar circumstances, the rule was discharged as above mentioned (a).

Adair, Serjt., for the Plaintiff, *Le Blanc*, Serjt., for the Defendant.

(a) This seems to account for the Court not allowing both rules, for the rule for judgment as in case of a nonsuit is sufficient to answer both purposes, if the affidavit be properly drawn.

Wednesday,
Jan. 29th.

The Duchess of CUMBERLAND, Executrix of the Duke of CUMBERLAND against PRAED, Administrator of BLACKWELL.

In the Exchequer Chamber in Error.

See 4 Term Rep. B. R. 585.

To an action of debt on a bond given to secure an annuity, the Defendant pleaded that no such memorial was enrolled as is required by the statute; the replication stated that a memorial was enrolled, containing the particulars which the statute directs; the rejoinder alleged, that the memorial in the replication mentioned, did not truly set forth the consideration on which the annuity was granted. This was clearly a *departure* from the plea (a).

THIS was an action of debt on a joint and several bond, given by the Duke of *Cumberland* and the Honourable *Temple Simon Luttrell*, to secure an annuity of 800*l.* a-year, to *Blackwell*.

* Plea, after oyer, by which it appeared that *Samuel Blackwell* had agreed with the Duke of *Cumberland* and *T. S. Luttrell* for the purchase of an annuity of 800*l.* a-year, during the life of the said *T. S. Luttrell*, for the price of 4800*l.* and which sum of 4800*l.* had been accordingly paid by the said *Samuel Blackwell* to the said Duke and *T. S. Luttrell*; 1. *Non est factum*. 2. *Plenè administravit*. 3. "That no such memorial of the said bond or writing obligatory, as is required to be inrolled in the High Court of Chancery, by a certain act of parliament made and passed in the seventeenth year of the reign of our sovereign Lord *George* the now king, intituled "An act for registering the grants of life-annuities, and for the better pro-

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(a) [Vide *Dudlow v. Watchoor*, 16 East, 41; 2 Saund. 846. (n.) 5th edit.]

tection

tection of infants against such grants," hath been inrolled in the High Court of Chancery, before the commencement of the suit of the said *Humphry Mackworth Praed* against her the said *Anne*, on the said bond or writing obligatory, as in and by the said act of parliament is directed and required; and this she the said *Anne* is ready to verify," &c.

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Cumberland,
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in Error.

Replication to the third plea.

That before the commencement of the suit of the said *Humphry Mackworth* against her the said *Anne* Duchess Dowager of *Cumberland*, on the said bond or writing obligatory, to wit, on the twenty-third day of *May* in the year of our Lord one thousand seven hundred and ninety-one, a memorial of the said bond or writing obligatory was inrolled in the High Court of Chancery, at *Westminster* aforesaid, and that such memorial did contain the day of the month and the year, when the said bond or writing obligatory bore date, and the names of all the said parties and witnesses, and did set forth the annual sum to be paid, and the name of the person for whose life the annuity was granted, and the consideration of granting the same, according to the form of the statute in such case made and provided, as by the inrolment of the said memorial remaining of record in the said High Court of Chancery, at *Westminster* aforesaid, more fully appears, and this he the said *Humphry Mackworth* is ready to verify by the said record, when and where, and in what manner the Court here shall order and direct, and therefore, &c.

Rejoinder.

"That true it is, that the said memorial of the said bond or writing obligatory, in the said replication of the said *Humphry Mackworth* mentioned, was inrolled on the day and year in the said replication mentioned in the High Court of Chancery, but the said *Anne* Duchess Dowager of *Cumberland* further saith that the said memorial does not truly set forth the consideration for which the said annuity in the said bond or writing obligatory mentioned was granted, but on the contrary thereof doth set forth a false and untrue consideration for granting the same, in this, that the said memorial sets forth, that the said annuity was granted in consideration of four thousand and eight hundred pounds paid to the said *Temple Luttrell* and the said *Henry* Duke of *Cumberland*, when in truth and in fact the said *Robert Blackwell* in the said writing obligatory and memo-

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rial mentioned, did not, at the time of the supposed execution of the above-mentioned supposed writing obligatory, or at any time before or afterwards, pay to the said Duke in his lifetime, the said four thousand eight hundred pounds in the said bond and memorial mentioned, or any part thereof, nor did he the said Duke at the time of the said supposed execution of the said bond, ever receive or take the said sum of money in the above-mentioned memorial specified to be the consideration for the said supposed writing obligatory, or any part thereof, or any other sum or sums of money, or any other consideration whatsoever, and this the said *Anne* Duchess Dowager of *Cumberland* is ready to verify," &c.

Special demurrer.

For that the said *Anne* Duchess Dowager of *Cumberland* hath in and by her plea above pleaded in bar alleged, that no memorial of the said writing obligatory in the said declaration mentioned, hath been inrolled, and yet in the said plea above pleaded by way of rejoinder, the said *Anne* Duchess Dowager of *Cumberland* hath admitted that there is a memorial inrolled, and hath alleged that the facts contained in the said memorial are untruly set forth, which is a *departure* from the said plea in bar: and also for that the said plea so pleaded by way of rejoinder, introduces matter to be tried *by the country*, after the said *Humphry Mackworth* had pleaded a plea by way of reply, with a verification to be tried *by the record*; and also for that the said plea so pleaded by way of rejoinder, alleges matters wholly immaterial and not traversable by the said *Humphry Mackworth*, and denies the existence of a fact not alleged in the said plea so pleaded by way of replication; and also for that the said plea so pleaded by way of rejoinder, is no answer to the allegations set forth in the plea of the said *Humphry Mackworth* above pleaded by way of reply; and also for that the said rejoinder is in other respects contradictory, inconsistent, uncertain, insufficient, and informal, &c.

[283] Judgment having been given by the Court of King's Bench, in favour of the Plaintiff, a writ of error was brought, and the common errors assigned. And now *Gibbs*, on the part of the Plaintiff in error, contended first, that the rejoinder was not a departure from the plea; and secondly, that the rejoinder did, in substance, negative the allegation in the replication, and was therefore inconsistent with it. 1. The plea states, that no
such

such memorial of the bond, as is required by the statute, was inrolled in the Court of Chancery, which is saying in other words, that there was no memorial inrolled containing the day of the month, and the year when the bond bears date, the names of the parties, &c. and the consideration of granting the annuity, according to the requisites of the statute. The replication is, that a memorial complying with those requisites, and stating the consideration of granting the annuity, was inrolled. The rejoinder alleges, that the consideration stated in the memorial was not the true one, which supports, instead of departing from the allegation in the plea, namely that there was no memorial inrolled containing the consideration of granting the annuity. 2. The replication states, that the memorial contained the consideration of granting the annuity; the rejoinder alleges that the memorial sets forth, that the annuity was granted in consideration of a sum of money jointly to *Temple Luttrell* and the Duke of *Cumberland*, but that in truth no part of the money was paid to the Duke at the time of executing the bond: now this is in effect a denial of what is stated in the replication, *viz.* that the memorial contained the consideration of granting the annuity.

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Shepherd, contra, was stopped by the Court.

Lord Chief Justice EYRE. The objection taken goes properly to the deed, and not to the memorial. By the third section of the statute it is enacted, "that in every deed, instrument or other assurance, whereby any annuity shall be granted, the consideration really and *bonâ fide*, (which shall be in money only,) and also the name or names of the person or persons by whom, and on whose behalf the said consideration or any part thereof shall be advanced, shall be *fully and truly* set forth and described in words at length;" and by the first, "that every memorial shall contain the day of the month and the year when the deed, bond, instrument or other assurance bears date, and the names of all the parties, and for whom any of them are trustees, and of all the witnesses; and shall set forth the annual sum or sums to be paid, and the name of the person or persons for whose life or lives the annuity is granted, and the *consideration or considerations* of granting the same." Now the use of the memorial being to notify to the world that such a deed exists, when it has done that, generally speaking, it has done its office, perhaps with the single exception of a

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secret trust, under the words “*for whom any of them are trustees.*” The true construction of the act therefore seems to be, that the deed shall fully and truly express the consideration, &c., and that the memorial shall truly set forth what is contained in the deed (a). And this will be clear, if the third section be transposed and read in the place of the first. Then the question is, whether the matter stated in the rejoinder be not a departure from the plea? That it is a departure is clear beyond a doubt, upon every principle of pleading. The plea in effect states that there was no memorial; the replication alleges a memorial containing the requisites which the law requires; and then the rejoinder introduces a fact which goes to vitiate the deed, but not the memorial. As the first point therefore is so plainly in favour of the Defendant in error, it is unnecessary to discuss the second, on which we give no opinion.

Judgment affirmed.

(a) But see *The Duke of Bolton v. Williams*, 4 Brown’s Cas. Chan. 997. [*Vide ante*, p. 12. n. (1).]

Wednesday,
 Feb. 5th.

SHEPHERD, One, &c. against MACKRETH.

In the *Exchequer Chamber*, in Error.

The Court of Exchequer Chamber is bound to allow double costs to the Defendant in error, on the affirmance of a judgment of the King’s Bench: but it is entirely a matter in their discretion, whether or not interest shall be allowed on such affirmance (a).

THIS action being brought to recover the amount of the Plaintiff’s bill as an attorney, for business done on behalf of the Defendant, a verdict was obtained and judgment entered in the Court of King’s Bench, which, on a writ of error being brought (apparently for delay), was affirmed without argument. And now a rule was granted to shew cause on the motion of *Gibbs*, why interest should not be allowed on the affirmance of the judgment, against which, *Williams* shewed cause; and after consideration, the opinion of the Court was thus delivered by Lord Chief Justice EYRE. It has been doubted, whether this Court had power to give interest in the shape of damages on

(a) [It seems that in the exercise of its discretion, the Court of Exchequer Chamber will only allow interest in cases where interest is recoverable below, unless it is distinctly proved that the writ of error was brought for delay, Tidd’s Pr. 1241. As to the particular cases in

which interest has been allowed, *vide ibid.*; it appears to have been improperly allowed in the principal case, *Walker v. Bayley*, 2 Bos. & Pul. 219. It is allowed on *non pros.*, as well as on affirmance, *Sykes v. Harrison*, 1 Bos. & Pul. 29.]

the

the affirmance of a judgment, or whether the double costs given by statute, were not in lieu of such damages. But it was declared by *Lord *Loughborough* (a), when his Lordship presided here, that it was entirely in the discretion of the Court to give damages for delay of execution, besides double costs; and there seems no difficulty in the question, if the several statutes upon the subject be attended to, which will be found all perfectly consistent with each other, and to have extended the benefit of 3 *Hen. 7. c. 10.* as to damages to *many* cases, and as to double costs, to *all*: so that it will appear that the double costs are not given in lieu of damages, but as a collateral and farther remedy for the same mischief. The statute 3 *Hen. 7. c. 10.* provides, that “if any Defendant or tenant, or any other that shall be bound by the judgment, sue before execution had, any writ of error to reverse any such judgment, *in delay of execution*, then if the said judgment be affirmed good in the said writ of error, and not erroneous, or if the said writ of error be discontinued, or the person that sues it be nonsuited in the same, the person against whom the writ of error is sued shall recover his *costs and damages* for his delay and wrongful vexation in the same, by discretion of the justice before whom the said writ of error is sued.” This statute not having been put in execution, the 19 *Hen. 7. c. 20.* directs that it shall be in future. The 3 *Jac. 1. c. 8.* enacts, that “no execution shall be stayed or delayed upon any writ of error, or supersedeas thereupon, for the reversing of any judgment given or to be given in any action or bill of debt upon any single bond, or upon any obligation with condition for the payment of money only, or upon any action or bill of debt for rent, or upon any contract, unless such person or persons, in whose name or names such writ of error shall be brought with two sufficient securities, such as the Court wherein such judgment shall be given shall allow of, shall first before such stay made or supersedeas to be awarded, be bound unto the party for whom any such judgment is or shall be given, by recognizance to be acknowledged in the same court, in double the sum adjudged to be recovered by the former judgment, to prosecute the said writ of error with effect, and also to satisfy and pay,

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(a) Several motions had been made at different times for the allowance of interest which were ordered to

stand over, that inquiry might be made as to the practice in error.

if

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[286] if the judgment be affirmed, all and singular the *debts, damages, and costs* adjudged upon the former judgment, and all *costs and damages* to be *also awarded*, for the *delaying of execution*." This statute prescribes a term upon which there may be a delay of execution, which is, the giving bail to answer the original judgment, and costs and damages to be awarded for delay of execution, evidently referring to the statute 3 Hen. 7. c. 10. The 13 Car. 2. st. 2. c. 2. s. 8. & 9. reciting the 3 Jac. 1. c. 8. and that other cases were within the same mischief, provides "that no execution shall be staid by any writ or writs of error, or supersedeas thereon, *after any verdict* and judgment thereupon obtained in any action of debt on the statute of Ed. 6. for not setting forth of tithes, nor in any action upon the case upon any promise for payment of money, actions of trover, covenant, detinue and trespass, unless such recognizance as is directed by the statute 3 Jac. 1. be first acknowledged:" and by sect. 10. it is enacted, "that if the judgment be affirmed, the person bringing the writ of error shall pay to the Defendant in error *double costs*, to be assessed by the Court where such writ of error shall be depending, for the delaying of execution." It must be acknowledged that there is a little ambiguity in this section; but without debating whether this should not be read "where such writ of error *for the delay of execution* shall be depending," this is manifestly a substantial independent provision of double costs, *absolute* and not at discretion, not only in the specified cases in 3 Jac. 1. and in the former clause, but in all cases whatsoever after verdict, popular and other penal actions excepted, which are so by the next section. The general provision of these statutes of Jac. 1. and Car. 2. is extended by 16 & 17 Car. 2. c. 8. to all personal actions whatsoever after verdict: and in the case of a writ of error on a judgment after verdict in dower or *ejectione firmæ*, the Plaintiff in error is to be bound with condition, if judgment be affirmed, or the writ discontinued, or the party nonsuit, to pay such costs, damages, and *sum or sums of money* as shall be awarded. Here a new term is introduced, "*sum or sums of money*" which is explained in the next section of the statute, which directs, "that the Court wherein such execution ought to be granted, upon such affirmance, discontinuance, or nonsuit, shall issue a writ to inquire as well of the mesne profits, as of the damages by waste committed after the first judgment

“ judgment in dower or *ejectione firmæ* ; and upon the return
 “ thereof judgment shall be given, and execution awarded for
 “ such mesne profits and damages, and also for costs of suit.”
 Here the legislature meaning to provide a satisfaction for a particular damage by waste, the words *sum or sums of money* are introduced ; and as neither this special damage, nor the general damage as applied to the two cases of *dower* and *ejectione firmæ* were matters of computation, which the Court could make at its discretion, a writ of inquiry is given. In this statute there are the same excepted cases, with the addition of writs of error brought by executors and administrators. These provisions are further extended by stat. 8 & 9 W. 3. c. 27. s. 3. to the case of the Marshal of the King’s Bench and Warden of the Fleet, bringing a writ of error to reverse judgments in actions for an escape, who are to put in special bail, in default whereof no execution is to be stayed, nor any sequestration of the profits of their offices delayed. These statutes are perfectly consistent with each other, being all in *pari materiâ*, and are nothing but a gradual extension of the statute 3 Hen. 7. c. 10. To prevent writs of error being brought for delay, double costs are absolutely given in all cases, and under particular circumstances damages also at the discretion of the Court. That rule lets in applications to the court, in all cases, which it is entirely in their discretion to refuse or comply with, and if complied with, to fix the quantity of the recompence.

Afterwards the following rule was drawn up.

Upon reading the rule made on *Wednesday* the 19th day of *November* last past, in this cause, and upon hearing counsel for both parties, IT IS ORDERED, that it shall be referred to the Clerk of the Errors, to calculate and ascertain the amount of the interest upon the final judgment obtained in this cause in his Majesty’s Court of King’s Bench, *after the rate of four pounds per cent. per annum (a)*, from the time of such final judgment being entered up, until the affirmance of the said judgment in this court, and that such interest may be added to the damages for which such final judgment was entered up.

By the Court.

(a) [In *Sykes v. Harrison*, 1 Bos. & Pul. 30. it was said, that five *per cent.* would be allowed in future; but *quære*, whether the Court would allow five *per cent.* at present? See Tidd’s Pr. 1242. 8th Ed.]

A similar

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A similar rule was also made on the affirmance of the judgment in the case of *The Earl of Lonsdale v. Littledale*, *antè*, 274. (a). See the cases cited in the notes, *Dougl.* 750. 8vo. edit. on this subject.

(a) [*Vide* 2 Bos. & Pul. N. R. 360. (n). where it is said, that with respect to this case it was observed by a gentleman who had been counsel in the cause, that the damages there had

been taken by consent, subject to reduction by arbitration; and therefore the Court had considered the amount ascertained by admission: see also 2 Campb. N. P. C. 428.]

END OF HILARY TERM.

During the Vacation after this Term, died Sir HENRY GOULD, Knight, one of the Justices of this Court; and SOULDEN LAWRENCE, Esquire, Serjeant at Law, was appointed to succeed him, and was knighted.

C A S E S

ARGUED AND DETERMINED

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IN THE

Courts of COMMON PLEAS

AND

EXCHEQUER CHAMBER,

IN

Easter Term,

In the Thirty-fourth Year of the Reign of GEORGE III.

IN THE HOUSE OF LORDS.

GIBSON *against* HUNTER, in Error.

A *VENIRE de novo* having been awarded in this cause, (*ante*, 187.) it came on to be tried a second time before Lord *Kenyon* at *Guildhall*, at the Sittings after *Trinity* term 1793, when the Plaintiffs in error tendered a bill of exceptions to his Lordship's directions to the jury, the record of which proceeded thus. "And the jurors aforesaid, impannelled to try the said issue being also come, were then and there in due

A. draws a bill of exchange on *B.* payable to a fictitious payee or order, and indorsed in the name of such payee, which *B.*

accepts. In

an action by an innocent indorsee for a valuable consideration against *B.* on the bill, in order to draw an inference, either that *B.* at the time of his acceptance knew the name of the payee to be fictitious, or that *B.* had given an authority to *A.* to draw the bill in question by having giving a *general* authority to *A.* to draw bills on *B.* payable to fictitious persons, evidence is admissible of irregular and suspicious transactions and circumstances relating to other bills drawn by *A.* on *B.*, payable to fictitious payees and accepted by *B.*, though none of those transactions or circumstances have any apparent relation to the bill in question, and though none of them prove that *B.* accepted any of those other bills with a knowledge that the payees mentioned in them were fictitious (*a*).

(*a*) [So on an indictment for uttering a forged note knowing the same to be forged, evidence that the prisoner had passed other forged notes is ad-

missible. *Rex v. Wylie*, 1 Bos. & Pul. N. R. 92. *Rex v. Ball*, 1 Campb. N. P. C. 324. Russ. & Ry. C. C. 132. *S. C. Hough's case*, Russ. & Ry. 120.]

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manner chosen and sworn to try the same issue, and upon the trial of the said issue so had, the said Plaintiff in maintenance of the said issue so joined as aforesaid on his part, produced to the jury aforesaid a certain paper-writing, purporting to be a bill of exchange, in the words and figures following; that is to say:

“ £521 7s.

“ *Falmouth, 11th March, 1788.*

“ Two months after date, pay to Mr. *William Fletcher*, or order, five hundred twenty-one pounds seven shillings, value received, with or without advice.

“ To Messrs. *Gibson and Johnson*,

“ *Nathaniel Hingston*.

“ Bankers,

“ *London.*

“ No. 2068. G. & J.

“ And upon which paper-writing were the following indorsements, that is to say, ‘ *William Fletcher*,’ ‘ By procuration of *Livesey, Hargreave and Company. A. Goodrich*.’ And the said Plaintiff thereupon proved, and gave in evidence to the said jury, that the said name of the said *Nathaniel Hingston*, purporting to be subscribed to the said paper-writing so produced to the said jury as aforesaid, was of the proper handwriting of the said *Nathaniel Hingston*, and that the said *Nathaniel Hingston* so subscribed the same paper-writing as the drawer of the same, and as the agent of the said *Livesey, Hargreave and Co.* in the said declaration mentioned, and was accustomed to draw bills of exchange for them, in his own name as their agent, and that the said *Nathaniel Hingston* resided at *Falmouth*, in the county of *Cornwall*, and that no such person as *William Fletcher* the supposed payee, in the said paper-writing mentioned, ever existed; and that the name of *William Fletcher* contained in the same paper-writing was merely fictitious, and that the said paper-writing so subscribed by the said *Nathaniel Hingston*, and before the same was indorsed with the name of ‘ *A. Goodrich*, by procuration of *Livesey, Hargreave and Co.*,’ and also before the letters and figures No. 2068, and the letters G. and J. were subscribed thereto, was sent by the said *Livesey, Hargreave and Co.* being the same persons mentioned and described in the said indorsement, by the name or firm of *Livesey, Hargreave and Co.* to the said Defendants for their acceptance, who accordingly accepted the same, by subscribing thereto the said letters and figures

No.

No. 2068, and also the said letters G. and J. as the initials of their respective surnames. That the indorsement of the name of *William Fletcher* upon the said paper-writing produced in evidence, was made by a clerk of the said *Livesey, Hargreave and Co.* whose name was not *William Fletcher*. And that the said bill was afterwards indorsed with the words, 'by procuration of *Livesey, Hargreave and Co. A. Goodrich*', by the said *A. Goodrich*, a clerk of the said *Livesey, Hargreave and Co.*, for and by procuration of the said *Livesey, Hargreave and Co.*, and paid and delivered by them to the said Plaintiff for a valuable consideration then paid to them by the said Plaintiff, and that the said Plaintiff did not know that the payee named in the said paper-writing was fictitious. And the said Plaintiff in further maintenance of the said issue so joined as aforesaid, on his part, and to shew that the said Defendants at the time of their said acceptance of the said paper-writing, either knew that the said name of *William Fletcher* contained in the same paper-writing and indorsed thereon as aforesaid was a fictitious name, or that the said Defendants had given authority to the said *Livesey, Hargreave and Co.*, to draw the said paper-writing so produced to the jury upon them, the said Defendants, by and in the name of the said *Nathaniel Hingston*, their said agent, expressed therein to be made payable to the order of a person who did not in fact exist, and whose name was a fictitious name, by having given a general authority to the said *Livesey, Hargreave and Co.* to draw bills of exchange upon them the said Defendants, by and in the name of the said *Nathaniel Hingston*, their said agent, expressed therein to be made payable to the order of persons who did not in fact exist, and whose names were fictitious names, did further prove and give in evidence to the said jury, that the said *Livesey, Hargreave and Co.* used to send down to the said *Nathaniel Hingston*, at *Falmouth*, printed forms of bills of exchange upon paper duly stamped for that purpose, with blanks therein for the dates, the times of payment, the names of the payees, and the sums to be made payable therein, to be signed by him the said *Nathaniel Hingston*, who used to return the same signed by him the said *Nathaniel Hingston* accordingly, to the said *Livesey, Hargreave and Co.*, who then filled up the bills so returned according to their convenience, with the dates, the times they were made payable, the payees' names, the greater part of which were fictitious,

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titious, and the residue real, and the sums for which they were to become *payable; and that this was done as the exigences of the house of *Livesey, Hargreave* and Co. required. That when the bills were thus filled up, they were taken to the Defendants for acceptance, some of the said bills when so taken for acceptance being unindorsed, and others of such bills at the time they were so taken for acceptance, having the names of the supposed payees in such bills indorsed upon the same in various hand-writings. That this happened in a great variety of instances, and to the amount of 20,000*l*. That the said bill or paper-writing produced in evidence, although dated at *Falmouth*, was not in fact filled up with the date, the time of payment, the name of the payee, or the sum of money therein mentioned, at *Falmouth*, but in *London*. That bills so drawn by the said *Nathaniel Hingston*, and dated from the same place, were frequently carried at several different times on the same day, by the said *Livesey, Hargreave* and Co. to the Defendants for acceptance, and accepted by them accordingly. That it requires three days to transmit a bill from *Falmouth* to *London* by the post. That a letter sent from *Falmouth* on the first day of any month, would not by the post reach *London* until the fourth. That in several instances, such bills drawn by the said *Nathaniel Hingston*, as from *Falmouth*, have been presented by the said *Livesey, Hargreave* and Co. on the second day after the date of them, to the Defendants for acceptance, and that they have accepted them without objection. That in many instances, bills so drawn by the said *Nathaniel Hingston* were presented by the said *Livesey, Hargreave* and Co. to the Defendants for acceptance on the days on which, by the course of the post, the same bills would have arrived, if sent on the respective days of their respective dates, but before the hours of the post's arrival on those days, and that they were accepted by the Defendants without objection. That in some instances such bills so drawn by the said *Nathaniel Hingston*, were carried by the said *Livesey, Hargreave* and Co. to the said Defendants for acceptance, after the arrival of the post from *Falmouth*, and other bills of the like kind were carried by them to the said Defendants for acceptance, at different times afterwards on the same day. That in many instances, bills so drawn by the said *Nathaniel Hingston* upon the said Defendants were carried by the said *Livesey, Hargreave* and Co. to the said Defendants

fendants for acceptance, upon the day on which they were
 * filled up by the said *Livesey, Hargreave*, and Co. the instant
 they were filled up, and whilst the ink with which they were so
 filled up has been wet. That the house of the said *Livesey,*
Hargreave and Co., where the said bills were so filled up, was
 not three minutes' walk from the Defendants' house. That this
 was the general course of dealing between the said house of
Livesey, Hargreave and Co. and the Defendants. That the
 ink has been apparently so wet at many times when the bills
 were so delivered for acceptance at the house of the said
 Defendants, that the person who so delivered the same bills
 was careful in carrying them, that they might not smear from
 the ink's being so wet as aforesaid. That at the time of the
 carrying such bills in this manner, it was very apparent that the
 signature of *Nathaniel Hingston* was dry, and an old writing,
 and that what had been written in to fill up the bills was fresh
 and wet. That the witnesses, by whose testimony the said
 Plaintiff gave the said evidence of the said several instances of
 the manner of presenting and accepting the said bills, had no
 particular memory to distinguish the bill or paper-writing pro-
 duced in evidence, as aforesaid, from the rest of the bills pre-
 sented to, and accepted by the said Defendants, as aforesaid :
 that the date of the said bill or paper produced in evidence, the
 name of the payee, and the sum therein expressed to be made
 payable, were filled up by a clerk in the said house of the said
Livesey, Hargreave and Company in *London*, and that was the
 general course before described with respect to the other bills
 that were carried by the said *Livesey, Hargreave* and Co. to the
 said Defendants wet for acceptance. That the Defendants paid
 bills under these circumstances to a large amount, and for a
 considerable length of time. And thereupon the counsel of
 the said Defendants did then and there object to the evidence
 so further given by the said Plaintiff in further maintenance of
 the said issue so joined, as aforesaid, on his part, and to prove
 that the said Defendants, at the time of their said acceptance of
 the said paper-writing, either knew that the said name of *Wil-*
liam Fletcher, contained in the said paper-writing, and indorsed
 thereon, as aforesaid, was a fictitious name, or that the said
 Defendants had given authority to the said persons using trade
 and commerce in the name or firm of *Livesey, Hargreave* and
 Company to draw the said bill or paper-writing, so produced
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to the jury, upon them the said Defendants, by and in the name of the said *Nathaniel Hingston* their said agent, expressed therein to be made payable to the order of a person who did not in fact exist, and whose * name was a fictitious name, by having given a general authority to the said *Livesey, Hargreave* and Company to draw bills upon them, the said Defendants, by and in the name of the said *Nathaniel Hingston*, their said agent expressed therein, to be made payable to the order of persons who did not in fact exist, and whose names were fictitious names; and did then and there insist, that the same evidence ought not to be received, or left to the consideration of the said jury in that behalf; and prayed the said Chief Justice, that he would declare to the jury aforesaid, that the same evidence was not proper evidence to be received, or to be taken into their consideration as evidence in maintenance of the said issue on the part of the said Plaintiff, or upon which they could find that the said Defendants at the time of their said acceptance of the said paper-writing, either knew that the said name of *William Fletcher* contained in the said paper-writing, and indorsed thereon as aforesaid, was a fictitious name, or that the said Defendants had given authority to the said *Livesey, Hargreave* and Company to draw the said bill or paper-writing, so produced to the said jury, upon them, the said Defendants, by and in the name of the said *Nathaniel Hingston* their said agent, expressed therein to be made payable to the order of a person, who in fact did not exist, and whose name was a fictitious name, by having given a general authority to the said *Livesey, Hargreave* and Company to draw bills of exchange upon them, the said Defendants, by and in the name of the said *Nathaniel Hingston* their said agent, expressed therein to be made payable to the order of persons who did not in fact exist, and whose names were fictitious names: yet the said Chief Justice did then and there declare and deliver his opinion to the jury aforesaid, that the said evidence, so objected to by the counsel of the said Defendants as aforesaid, was proper evidence to be received in maintenance of the said issue, on the part of the said Plaintiff, as to the third count of the said declaration, and to be left to their consideration as evidence in maintenance of the said issue on that count, to prove that the said Defendants, at the time of the said acceptance of the said paper-writing, either knew that the
said

said name of *William Fletcher*, contained in the said paper-writing, and indorsed thereon as aforesaid, was a fictitious name, or that the said Defendants had given authority to the said *Livesey, Hargreave* and Co. to draw the said bill or paper-writing, so produced to the said jury, upon them, the said Defendants, by and in the name of the said *Nathaniel Hingston*, their said agent, expressed therein to be made payable to the order of a person who in fact did not exist, and whose name was a fictitious name, by having given a general authority to the said *Livesey, Hargreave* and Co. to draw bills of exchange upon them the said Defendants, by and in the name of the said *Nathaniel Hingston*, their said agent, expressed therein to be made payable to the order of persons who did not in fact exist, and whose names were fictitious names; and that if the said jury should believe upon that evidence, that the said Defendants had such knowledge, or had given such authority to the said *Livesey, Hargreave* and Company, they might upon the whole evidence find their verdict for the said Plaintiff upon the said issue so joined as aforesaid, as to the said third count of the said declaration, but not upon any of the other counts contained in the said declaration (a): and thereupon, with that direction, left the same to the said jury; and the jury aforesaid then and there gave their verdict for the said Plaintiff, as to the said third count of the said declaration, with 52l. 7s. damages and 40s. costs; and for the said Defendants as to all the other counts in the said declaration mentioned. Whereupon the said counsel for the said Defendants did then and there except to the aforesaid opinion of the said Chief Justice, and insisted that the evidence so given as aforesaid, for the purpose aforesaid, and which had been so objected to as aforesaid, was inadmissible to maintain the said issue on the part of the said Plaintiff, and to prove that the said Defendants, at the time of their said acceptance of the said paper-writing, knew that the said name of *William Fletcher* contained in the said paper-writing, and indorsed thereon as aforesaid, was a fictitious name, or that they had given authority to the said *Livesey, Hargreave* and Company to draw the said bill or paper-writing, so produced to the said jury, upon them, the said Defendants, by and in the name of the said *Nathaniel Hingston*, their said agent, expressed therein to be made payable to the order of a

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person who in fact did not exist, and whose name was a fictitious name, by having given a general authority to the said *Livesey, Hargreave* and Company to draw bills upon them, the said Defendants, by and in the name of the said *Nathaniel Hingston* their said agent, expressed therein to be made payable to the order of persons who did not in fact exist, and whose names were fictitious names; and inasmuch as the said several matters so produced and given in evidence on the part of the said Plaintiff, and by the counsel of the said Defendants objected to and insisted on as not admissible in evidence on the trial of the issue aforesaid, do not appear by the record of the verdict aforesaid, the said counsel for the aforesaid Defendants did then and there propose their aforesaid exception to the opinion of the said Chief Justice, and requested the said Chief Justice to put his seal to this bill of exceptions, containing the said several matters so produced and given in evidence on the part of the said Plaintiff as aforesaid, according to the form of the statute in such case made and provided; and thereupon the said Chief Justice, at the request of the counsel for the above named Defendants, did put his seal to this bill of exceptions, pursuant to the aforesaid statute, in such case made and provided, on the 21st day of *June* aforesaid, in the 33rd year of the reign of his said present Majesty.

In *Michaelmas* Term, 1793, the Court of *King's Bench* gave judgment for the Defendant in error, upon which judgment the Plaintiffs brought a writ of error in parliament, and having assigned the common errors, hoped that the judgment of the Court of *King's Bench* would be reversed, for the following (among other) REASONS:—

I. Because the evidence excepted to has no relation to the particular bill now in question, and does not purport or affect to apply itself to such bill, and it is impossible that the facts of any one particular transaction can legally be inferred from circumstances applying wholly to others.

II. Because it follows as a consequence from the first reason, that even if it had been proved that the Plaintiffs in error had accepted other bills, knowing that the supposed payees in them were fictitious, it could not legally be inferred from thence, that they had *actual* knowledge of the supposed payee being fictitious in the bill in question.

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III. Because, if the evidence excepted to was not legally admissible,

missible, and to be left to the jury as evidence, from which they might properly infer *actual* knowledge in the Plaintiffs in error of the bill in question being made payable to a fictitious payee, it cannot be admissible to prove *general authority* to have been given by the Plaintiffs in error to *Livesey, Hargreave* and Co. to draw bills upon them payable to fictitious payees, inasmuch as a *general* authority to do certain acts, where an *actual* authority is not proved, can only be inferred by shewing an acquiescence of the person supposed to have given such authority, in other acts of a similar nature, done with his privity or consent; and if the evidence excepted to did not prove any one act of a similar description with that in question to have been done with the privity and by the consent of the Plaintiffs in error, no given number of instances of the same kind can be proper evidence upon which to presume a *general* authority to have been given by them to do such acts. Any number of instances, each of which, taken singly, proves nothing, can never prove any thing when taken collectively; and if the evidence excepted to would not be admissible to prove that the Plaintiffs in error had accepted any single bill with knowledge that the payee therein was fictitious, the permitting it to be offered to the jury as evidence, from which they might infer the fact of the Plaintiffs in error having given *general authority* to *Livesey, Hargreave* and Co. to draw bills upon them, payable to fictitious payees, would be attended with this absurdity, that the fact of such *general* authority would be inferred from the assumption of a number of antecedent facts, when the evidence was not admissible to prove the existence of any single antecedent fact, from a number of which the fact of *general* authority was to be inferred.

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REASONS for the Defendant in Error.

It is presumed that the Plaintiffs in error mean to argue, that the evidence given at the trial, to prove their knowledge that the payee named in the bill in question was a non-existing person, or that the house of *Livesey, Hargreave* and Company, with their privity, or under their authority, drew bills upon them payable to fictitious payees, ought not to have been received, as neither directly proving the facts to which such evidence was applied, nor raising any probability or presumption of the existence of such facts, or at most a probability or pre-

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sumption so light and uncertain, as not to be entitled to any attention in a court of law.

The Defendant in error humbly submits, that it is competent to a jury to find matters of fact, without direct or positive testimony of those facts, and upon circumstantial evidence only, although the inference or conclusion to be drawn from the circumstances proved, be not absolutely certain or necessary.

That is sufficient if the circumstantial evidence be such as may afford a fair and reasonable presumption of the facts to be tried, and if the evidence has that tendency it ought to be received, and left to the consideration of the jury, to whom alone it belongs to determine upon the precise force and effect of the circumstances proved, and whether they are sufficiently satisfactory and convincing to warrant them in finding the fact in issue.

The Defendant in error humbly contends, that the privity or authority attempted to be proved, has, if necessary to support the verdict, been found upon circumstances affording a degree of probability of the fact, sufficiently strong to entitle the Defendant in error to prove those circumstances, and submit them to the consideration of the jury, as a ground of presumption.

The whole of the bill-transaction in evidence, appears as between *Livesey, Hargreave* and Company, and the Plaintiffs in error, to have been a joint concern of those two houses, merely for the purpose of raising money. Though the extent of the negotiation was so large, there is no evidence to shew that it arose out of any real mercantile transaction between them, but the contrary is to be inferred from the whole of the evidence given.

[298] The irregularities and improprieties in the manner of making the bills, are such as would, for preserving the credit of the drawers, have been carefully concealed by them from the persons required to accept such bills, unless those persons had been privy to the whole plan of the negotiation, and the mode of conducting it; but the evidence which is objected to proves the most open and undisguised exposure of all those circumstances to the view and knowledge of the Plaintiffs in error.

These are all circumstances hardly reconcileable with any other supposition than that of an entire privity betwixt *Livesey, Hargreave* and Company, and the Plaintiffs in error; and it would be greatly injurious to the fair purchasers of bills of exchange, and a great encouragement to fraud, if such circumstances

stances could not be proved against the acceptor, and that the acceptor might always resist the performance of his engagements when there should be a defect of positive or demonstrative evidence of a fact, of which none but the drawer and acceptor, the parties interested, might have a full knowledge.

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After argument, the following question was proposed to the Judges, *viz.*

“Whether the circumstances mentioned in the bill of exceptions be sufficiently relative to the propositions therein also mentioned, *viz.* that the Defendants in the action knew the name *Fletcher* was fictitious, or that the Defendants had given authority to *Livesey and Co.* to draw bills upon them the said Defendants payable to fictitious payees, so that they ought to have been received, and left to the jury as evidence thereof?”

On this question there was a division among the judges, who delivered their respective opinions *seriatim*; but the majority of them, together with the Lord *Chancellor* and Lord *Kenyon*, having declared that they thought the evidence ought to have been received and left to the jury, the

Judgment was affirmed (*a*).

(*a*) The various questions respecting bills of exchange, which arose from the bankruptcy of *Livesey and Co.* and *Gibson and Co.* seem at length to be finally settled. The several stages through which they passed may

be seen by referring to 3 Term Rep. B. R. 174. *Tatlock v. Harris*, *ibid.* 182. *Vere v. Lewis*, 484. *Minet v. Gibson*, *ante*, vol. I. 569. *Gibson v. Minet*, and vol. II. 187. *Gibson v. Hunter*. [6 Br. Pa. Ca. 235. 255.]

IN THE HOUSE OF LORDS.

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The Earl of LONSDALE *against* LITTLEDALE in Error.

See this case *ante*, 267. [5 Br. P. C. 519. S. C.]

THE Plaintiff in error having assigned the same error as in the Court of Exchequer Chamber, hoped the judgment would be reversed for the following among other REASONS:—

1st. Because the jurisdiction assumed by the Court of *King's Bench*, of proceeding against a Peer *by original bill*, is not warranted either by the common or statute law of this realm.

wards assign for error, that he ought to have been sued by original writ and not by bill. *Quære.* Whether the Court of King's Bench has jurisdiction to proceed against a Peer of Parliament by bill?

A Peer of Parliament having pleaded in chief to a bill filed against him in the Court of King's Bench cannot after-

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By the common law that court has power to hold plea by bill against two descriptions of persons only, *viz.* against the attornies, officers, ministers, or clerks of the Court, who are supposed to be present in court (and the course always has been to exhibit original bills against them, as being present in court in their proper persons), and against persons in custody of the marshal of the Marshalsea of the Court, and in such bills it is necessary to allege that the Defendant is in the custody of the marshal of the Marshalsea of that court: this last mentioned branch of its jurisdiction in process of time, has been extended to all persons against whom the process of *capias* could issue, by the following fiction, *viz.* the Court having an original jurisdiction in trespasses *vi et armis*, issues a writ called a bill of *Middlesex* or *latitat*, commanding the sheriff *to take the body of a defendant*, as for a supposed trespass *vi et armis*, which the Defendant never has in reality committed, and the Defendant *being taken and brought into the custody of the marshal* of the Court upon this writ, the Plaintiff may exhibit a bill against him, as *in the custody of the marshal* for any cause of action whatsoever, upon which fiction rests this branch of its jurisdiction at this day; and the Defendant being taken, and brought into the custody of the marshal of the Court upon this writ, the Plaintiff may exhibit a bill against him as in custody of the marshal, for any cause of action whatsoever, upon which fiction rests this branch of its jurisdiction at this day. This writ, except in cases where an *ac etiam* for bail is inserted, is not executed upon the Defendant's person, but he is served with a copy of it and appears, and files common bail, which is a proceeding by which a Defendant, instead of being committed to the custody of the marshal, is supposed to be delivered on bail upon a *cepi corpus* to *John Doe* and *Richard Roe*, which is the same as a commitment to the custody of the marshal. *It is evident this mode of proceeding never could apply to a peer, because his person could never be arrested and brought into the custody of the marshal by a capias in trespass, as no such capias lies against a peer:* and therefore, *Lilly* in his entries, page 21, observes in a note, that a peer cannot be sued in the King's Bench by bill, by reason he is therein alleged to be in the custody of the marshal. The next, and only other jurisdiction which the King's Bench has in civil actions, is by an authority delegated to the Court by an original writ issued from the Court

Court of *Chancery*, returnable in the King's Bench, and this applies to peers as well as other persons, with this difference as to the process by which the Defendant is brought into Court to answer as against all persons (except peers, or privileged persons, during the time of privilege) the process is *Summons*, *Attachment*, and *Capias*, against peers, summons and distringas in infinitum only *as no Capias lies*, the common law having given no jurisdiction to the King's Bench of proceeding against peers, except by original writ only. The next question is, whether the statute of the 12th and 13th W. 3. has given that Court a jurisdiction of proceeding against them by original bill: that statute enacts, "that from and after the four and twentieth day of *June*, one thousand seven hundred and one, any person or persons shall and may commence and prosecute any action or suit; in any of his Majesty's Courts of record at *Westminster*, or High Court of Chancery, or Court of *Exchequer*, or the Duchy Court of *Lancaster*, or in the Court of *Admiralty*, and in all causes matrimonial and testamentary in the Court of the *Arches*, the prerogative Courts of *Canterbury* and *York*, and the delegates, and all courts of appeal against any peer of this realm, or lord of parliament, or against any of the knights, citizens, and burgesses of the House of Commons for the time being, or against their or any of their menial or other servants, or any other person entitled to the privilege of parliament at any time from and immediately after the dissolution or prorogation of any parliament until a new parliament shall meet, or the same be re-assembled, and from and immediately after any adjournment of both Houses of Parliament for above the space of fourteen days, until both Houses shall meet or re-assemble; and that the said respective Courts shall and may after such dissolution, prorogation, or adjournment as aforesaid, proceed to give judgment and to make final orders, decrees and sentences, and award execution thereupon, any privilege of parliament to the contrary notwithstanding; provided nevertheless, that this act shall not extend to subject the person of any of the knights, citizens, and burgesses of the House of Commons, or any other person intitled to the privilege of parliament to be arrested during the time of privilege; nevertheless, if any person or persons having cause of action or complaint against any Peer of this realm, or Lord of parliament,

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“ such person or persons after any dissolution, prorogation, or
 “ adjournment as aforesaid, or before any sessions of parlia-
 “ ment, or meeting of both Houses as aforesaid, shall and may
 “ have *such process* out of his Majesty’s Courts of *King’s Bench*,
 “ *Common Pleas*, and *Exchequer*, against such Peer or Lord of
 “ Parliament, *as he or they might have had against him out of*
 “ *the time of privilege*; and if any person or persons having
 “ cause of action *against any of the said knights, citizens, or bur-*
 “ *gesses, or any other person intitled to privilege of parliament,*
 “ after any dissolution, prorogation, or such adjournment as
 “ aforesaid, or before any sessions of parliament, or meeting of
 “ both houses as aforesaid, such person or persons shall and
 “ may prosecute such knight, citizen, or burgess, or other per-
 “ son intitled to the privilege of parliament in his Majesty’s
 “ Court of *King’s Bench*, *Common Pleas*, or *Exchequer*, by
 “ summons and distress infinite, *or by original bill*, and sum-
 “ mons, attachment, and distress infinite thereupon, to be issued
 “ out of any of the said Courts of record.”

It is sufficient only to read the act above mentioned, to see that the form of proceeding against a Peer is not thereby varied, *and that the original bill is not given against peers, but only against knights, citizens, or burgesses, or other persons entitled to privilege of parliament*, which words, *other persons*, can by no rule of construction be contended to apply to Peers, but only to inferior degrees of persons, as officers, ministers, and clerks of the Houses of Parliament, &c. And what is the most convincing proof that the Peers did not mean to give a jurisdiction by original bill against them is, that the bill originally sent up to the Lords by the Commons at the parts above marked, had the words “ Peer of this realm, or Lord of parliament,” and the Lords struck out those words: *vide journals of the House of Commons*, Vol. 13, 567. Notwithstanding the above, the Court of *King’s Bench* in a case of *Gosling v. Lord Weymouth*, determined that the original bill was the common law mode of proceeding against Peers of parliament, before the statute of 12 *W. 3.* on the authority of a case of *Say v. Lord Byron*. Lord *Mansfield* gives the judgment thus: “ the note
 “ I have of the case of *Say v. Lord Byron*, is as follows, *Mich.*
 “ 26 *Geo. 2. B. R.* *Mr. L. Robinson* moved, (upon an affidavit,
 “ that the Plaintiff had sued out two writs of *distringas*, where-
 “ upon the sheriff had levied 40s. and 4*d.*; and that no bill was
 “ filed)

“ filed) for a rule to shew cause why the said two writs should
 “ not be quashed, and the money levied thereon be restored,
 “ he objected that a Peer ought not to be sued by bill, but by
 “ original writ; and that the statute 12 and 13 Wm. 3. c. 3.
 “ does not make any variation in the proceedings against Peers,
 “ but respects, in this particular, commoners only: Mr. *Stowe*
 “ shewed cause, and the rule was enlarged. Upon shewing
 “ cause at a further day the Court declared, that there were
 “ many precedents of actions against Peers of parliament, for
 “ many years before the statute of Wm. 3. as certified by the
 “ Master and Mr. *Day* the clerk of the rules, and said, why
 “ could not the Court support its ancient jurisdiction as well as
 “ the *Court of Exchequer* hold plea as debtor *Domini Regis*?
 “ and the Court in that case discharged the rule.” This is an
 authority in point. The original bill was the common law
 process.

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“ *Per Curiam, Judgment quod Defendens respondeat ouster.*”

It is a singular thing, that if the proceeding by original bill
 as against Peers, was the common law proceeding before the
 statute of Wm. 3. that it should not have been also the mode of
 proceeding against members of the House of Commons, and yet
 that has not been pretended; if it were so, it is also singular it
 should not have been known to some writer upon the law, or
 that it should not be found in some case, or book of reports or
 practice; and yet it may with confidence be asserted, that no
 such thing is ever noticed in any book of law or practice, nei-
 ther is it consistent with any principle of law; therefore, the
 Plaintiff in error trusts, that neither a supposed certificate of
 a master and clerk of the rules in the *King's Bench*, in a matter
 in which they were materially interested in point of emolument
 to establish the proceeding they certified, nor any erroneous
 practice which may have followed from the precedent of *Gos-
 ling v. Lord Weymouth*, will be sufficient to establish this juris-
 diction.

2d. In the next place, it is contended, that the Plaintiff in
 error by not having pleaded his Peerage in abatement, has pre-
 cluded himself from taking any objection in a Court of error
 to the mode of proceeding by bill. In answer to which, the
 Plaintiff in error submits that the want of jurisdiction is matter
 of error; and that if a Court has no jurisdiction, even the
 Defendant's

1794. Defendant's consent * could not give it jurisdiction: *that the want of jurisdiction in this case appears on the record*, and therefore as the Court sees it, there is no occasion for a plea to disclose it, as there is of a matter dehors the record. The proceeding by original bill inverts the whole course of proceeding against Peers, from the beginning to the end of the suit. The returns of writs in every stage of the suit are totally different, where the proceeding is by original writ, and where by bill; and not only so, but a new jurisdiction in error is created by proceeding by bill instead of original, for where the proceeding is by original bill in the *King's Bench*, a writ of error is given to the Court of *Exchequer Chamber*, which is not the case where the proceeding is by original writ in the *King's Bench*, as there the writ of error is returnable in Parliament only.

REASONS for the Defendant in Error.

1st. The Court of King's Bench has jurisdiction to proceed against a Peer of the realm by bill. This appears by the stat. 12th and 13th *Will. 3. c. 3*, which authorizes against a Peer such process, during the times there limited (which limitations are since removed, and extended to all times by stat. 10th *Geo. 3. c. 50.*) as might have been had against him out of the time of privilege. Before that statute, Peers were by the practice of the Court (and the practice of the Court constitutes the law of the Court) sued there out of the time of privilege by this form of proceeding, namely, by bill and by summons and distress thereupon; and may now therefore by virtue of the above statutes, be so sued at any time. That this was the practice of the Court before the statute of King *William*, not only is to be inferred from the same continued subsequent practice, the legality of which has till the present case been unobjected to (except in the two instances after mentioned, by which its legality is established), but also appears from precedents certified to that Court when this very point was there agitated, in the case of *Say* against Lord *Byron*, so long since as *Michaelmas Term*, 26th *Geo. 2.* (*Sayer's Reports*, 63; and *Cowper's Reports*, 845.) The Court in that case, on reference being made to the statute of King *William*, confirmed the precedents and practice; and that decision was afterwards confirmed

firmed by the same Court in the case of *Gosling* against Lord *Weymouth*, in *Trinity* Term, in the 18th year of his present Majesty. (*Cowper's Reports*, 844.)

2d. These two cases are not only determinations in point, but are even stronger than the present case; as in both those cases this objection to the mode of proceeding was taken as it ought to be (if a valid objection) in the first instance: in the one case by motion before defence to the action, and in the other by plea in abatement. There appears not any appeal from either of those decisions, and they have ever since been acquiesced in, and acted upon by the same continued practice as the law of the land.

3d. But even if these cases could be over-ruled, and allowing that the Plaintiff in error, being a Peer, might in the present action have objected to this mode of proceeding against him by bill; yet the objection cannot now be taken as matter of error: it is merely an objection of form. The objection is, that although the Court has jurisdiction over the subject-matter of the suit, and over the party, though a Peer, and has power to proceed by bill, yet this is not the proper form of proceeding in the present case against a Peer. The objection cannot be extended to every case of proceeding by bill against a Peer; for if a Peer were in the custody of the marshal of the King's Marshalsea (as he may by law be upon a criminal charge), whilst he remains in such custody a bill may be exhibited against him in the Court of King's Bench, as against any other person. In that case the objection could not hold. In other cases if it could avail, it should be taken by plea in abatement, as a reason for not answering to the bill. If not so taken, but the party makes defence, and answers to the bill, the jurisdiction of the Court is admitted, and the objection waived; and it cannot afterwards be received. The party by making a full defence, by praying an imparlance, and pleading to the merits, submits to answer, and by praying that those merits may be inquired of by a jury, admits that the Court has on those very proceedings power to direct and take the inquiry. Even in ancient times, when the jurisdiction of the Court of King's Bench to proceed by bills seems to have been confined to the case of persons actually prisoners of the Court, so that others (except perhaps the officers of the Court) were not compellable to answer to a bill, yet it was in the election of

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of others so to answer if they would; and if they did answer, the proceeding against them by bill was good. This appears by *Brook's Abridgement*, tit. *Bill*, Pl. 6. and *Responder*, Pl. 30. As this objection might be thus waived by a common person, so a Peer in this case may waive his privilege; and he does waive it, if he does not insist upon it at the proper time. The objection cannot now be allowed in this action, without determining not only that every judgment that has been had against a Peer, where the proceeding has been by bill, is illegal; but that all such judgments given within the last twenty years, though upon the authority of adjudged cases, and the constant practice of the Court of King's Bench, are liable to be reversed by writ of error.

After argument at the bar of the House, the following questions were proposed to the Judges.

I. Whether the Court of King's Bench has any jurisdiction to hold plea in a personal action against a Peer of the realm, and Lord of Parliament, who is neither in the custody of the marshal, nor is an officer or minister of that Court, without the King's original writ issuing out of his Chancery, to warrant such action?

II. If the Court has no such jurisdiction, can it derive such jurisdiction from the acquiescence of the Defendant by pleading to issue, and proceeding to trial in an action commenced without the King's original writ?

[307] In answer, Lord Chief Justice *Eyre* stated the unanimous opinion of the Judges, that the first question would have admitted considerable doubt, if the objection had been made in an earlier stage of the cause, and that the cases of *Say v. Lord Byron*, and *Gosling v. Lord Weymouth*, were not to be considered as decisive authorities on the subject. But that after pleading in chief, it was too late for the Defendant to object to the jurisdiction of the Court.

Judgment affirmed.

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Monday,
May 26th.DIXON *against* BIRCH and TYTE.

IN this case a rule was granted to shew cause why an indenture, bond and warrant of attorney entered into to secure an annuity should not be given up to be cancelled, and the money levied under an execution staid in the hands of the sheriff. The facts were simply these; *Birch* granted the annuity to *Dixon*, *Tyte* joining as a security, *Dixon* assigned the whole of it to *Cousins*, and the execution issued in the name of *Dixon*: there was a memorial of the original indenture, bond and warrant, but none of the assignment from *Dixon* to *Cousins*, on the omission of which the application to the Court was founded. But after argument, the Court held that as there was a memorial of the original securities inrolled, the object of the statute 17 Geo. 3. c. 26, which was the protection of the grantor was fully complied with, and it was not necessary to inroll the assignment.

A. grants an annuity to *B.* the whole of which *B.* assigns to *C.* There being a memorial inrolled of all the original securities, it is not necessary that there should be also one of the assignment (a).

Rule discharged (b).

(a) [Vide *Hammond v. Forster*, 5 Term Rep. 635.]

(b) A similar decision has lately taken place in the Court of King's Bench, *Bromley v. Greathead*, Hil. 34 Geo. 3. Hunt on Annuities, 188. in which case, as well as in the present, the whole annuity was assigned to one person. But if it had been assigned in parts to different persons, it seems necessary from the

case of *The Duke of Bolton v. Williams*, 4 Brown's Chan. Cas. 297, that each assignment should be registered. So also where a gross sum arising from a certain fund is given to trustees for the payment of several annuities, the memorial is bad, if it state the grant to be of only *one annuity* of such gross sum. *Hood v. Burlton*, 4 Brown's Chan. Cas. 121. Hunt on Annuities, 79.

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BRANDON and Others, Assignees of BRANDON, a Bankrupt, *against* PATE.Monday,
May 26th.

THIS was an action of debt, brought to recover money lost by the bankrupt at hazard; and the first count of the declaration stated "that whereas before the bankruptcy of the said *Abraham Brandon*, and within three months next before the commencement of this action, to wit, on &c. at &c. the said *Robert* (the Defendant) received to the use of the said

The assignees of a bankrupt may recover from the winner, money lost by the bankrupt before his bank-

ruptcy at play, in an action of debt on the Stat. 9 Anne, c. 14 (a).

(a) [Vide *Holmes v. Walsh*, 7 T. R. 458. where assignees recovered the penalty against a person convicted of

falsely swearing to a debt. See also *Clark v. Calvert*, 8 Taunt. 750.]

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Abraham Brandon the sum of one hundred and seventy-eight pounds and ten shillings of lawful money of *Great Britain*, being so much money lost by the said *Abraham Brandon* to the said *Robert* at one sitting, by then and there playing with him together with certain other persons, to the said *Sarah Thomas* and *Daniel Isaac* (the Plaintiffs) unknown, at a certain game called *Hazard*, and which money so lost was, on the day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, paid by the said *Abraham Brandon* to the said *Robert* the winner thereof; whereby and according to the form of a certain act made in the ninth year of the reign of *Queen Anne*, intituled "an act for the better preventing of excessive and deceitful gaming," an action accrued to the said *Abraham Brandon* before he became a bankrupt, to demand and have of and from the said *Robert*, the said sum of one hundred and seventy-eight pounds and ten shillings, parcel of the said sum of seven hundred and fourteen pounds above demanded." The second count stated that before the bankruptcy of the said *Abraham Brandon*, and within three months next before the commencement of this action, to wit, on &c. at &c. the said *Abraham* lost to the said *Robert* at one sitting, by then and there playing with the said *Robert* at the said game called *Hazard*, another large sum of money, to wit, the sum of one hundred and seventy-eight pounds and ten shillings, of like lawful money, and on the day and year aforesaid, at, &c. paid the said sum of money so lost as last aforesaid to the said *Robert* the winner thereof; and which said last mentioned sum of money was not repaid to the said *Abraham Brandon* at any time before his said bankruptcy, &c. The third count stated that the Defendant after the bankruptcy was indebted to the Plaintiffs as assignees, &c. similar to the second count. The fourth count

[809] was for money had and received by the Defendant to the bankrupt's use before his bankruptcy.

There was a general demurrer to the three first counts, and *nil debet* pleaded to the last.

This demurrer was twice argued; the first time in *Hilary Term* by *Runnington*, Serjt., for the Defendant, and *Lawrence*, Serjt., for the Plaintiffs; and a second time in the present term, by *Bond*, Serjt., for the Defendant, and *Adair*, Serjt., for the Plaintiffs. In support of the demurrer, the substance of the arguments was as follows.

The

The assignees of the bankrupt cannot maintain this action, since there was not such a debt due to him as could be vested in them by the assignment. At common law gaming was not illegal, and when a statute makes that unlawful which before was lawful, and points out a particular mode of proceeding, that mode must be pursued. *Cro. Jac.* 644, *Castle's case*, 2 *Burr.* 803, *Rex v. Robinson*. Now the statute 9 *Anne*, c. 14, which gives the action to the loser of 10*l.* to recover the money back from the winner, enacts that if within three months the loser does not himself sue, the action may be brought by a common informer, who shall recover the same and treble the value together with costs. The right of action therefore is personal in the loser, of which, if he does not avail himself, it passes to another person: there cannot be then a debt vested in him which will go to his representatives under a commission of bankrupt. It depends on the choice of the loser, whether he or a common informer shall recover the money, and no debt or duty could vest in him till he made his election by commencing the action, by parity of reason to other cases of election, where nothing passes before election made. *Co. Litt.* 145 *a.* 2. *Co.* 35 *a.* *Heyward's case*. There is also another reason why this action cannot be supported; the stat. 12 *Geo.* 2. c. 8. makes the playing at hazard equally penal both to the winner and the loser, and when both parties are equally criminal, the maxim may be applied, "*in pari delicto potior est conditio defendentis*," according to the doctrine of the cases of *Smith v. Bromley*, *Dougl.* 696 *in notis*, *Clarke v. Shee*, *Cowp.* 197, *Browning v. Morris*, *id.* 790, *Jaques v. Golightly*, 2 *Black.* 1073.

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On behalf of the Plaintiffs, it was contended that the loser of the money had a debt vested in him from the winner, and being vested, that it passed to his assignees. The statute enacts, that the loser may recover the money by action of debt, and when it prescribes the form of the declaration, it says "in which action it shall be sufficient for the Plaintiff to allege, that the Defendant or Defendants are *indebted* to the Plaintiff, or *received to the Plaintiff's use* the monies so lost and paid, or *converted* the goods won of the Plaintiff to the Defendant's use." Now the two first of these phrases clearly imply that a debt is due to the Plaintiff, and the last, that the property of the goods, where goods have been lost, is also in him.

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him. In *Turner v. Warren*, 2 *Stra.* 1079, the sum lost was considered so much as a debt, that the winner was holden to bail: and in *Bones v. Booth*, 2 *Black.* 1226, it is said by one of the judges, that the statute makes the winning 10*l.* at sitting a nullity, and therefore gives the loser an action to recover back what still properly *continues to be his own money*: and in both those cases the statute is considered as a remedial law with respect to the loser; and being remedial, it is to be liberally construed for the purpose of the remedy. With regard to the supposed analogy from cases of election, it is to be observed that the party here has not an election to do one of two things, but only to do one thing, or leave it undone.

Lord Chief Justice EYRE. After two arguments, I still feel a difficulty in saying this action can be maintained. It seems to me that unless a duty attached in the bankrupt, the action cannot be supported. Now if there was any duty in him, it must have been given by the statute, and not in consequence of any supposed contract. But though the statute has vested a right of action in the loser, liable to be divested at the expiration of three months, yet I think no duty vests in him till the action is brought (*a*). If there be a duty in him on principle, it is difficult to deny that it would go to his executors, or that they might maintain an action against the executors of the winner, but the statute enacts, that if the party himself does not sue within three months, any other person may bring the action. On principle too, it should seem, that if there be a duty, assumpsit would lie for it; but that cannot be, as the statute specifies an action of debt. It appears therefore to me to be the plainest and best construction to say, that no duty is fixed in the loser till the action is brought.

[311] HEATH, J. An executor clearly could not bring the action, which by the statute is limited to the loser himself, within the three months. But the assignees of a bankrupt are different from other representatives; for if the party himself were to recover the money, he must pay it over to the assignees. It is to be considered as part of the bankrupt's estate, which has wrongfully passed to the winner; and if so, the assignees have a right to it, and ought in reason to sue for it. It cannot pos-

(*a*) [No right or duty vests before action brought, where the suit is by a common informer (2 *Bl. Com.* 437),

but *quære* where the party grieved sues?]

sibly be of any benefit, to hold that the debt does not vest in the assignees, and this being a remedial statute, we are so to construe it as best to answer the purpose for which it was made.

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ROOKE, J. I am of opinion that this action may be maintained. The meaning of the act is, that the money lost and paid to the winner is part of the property of the loser. Upon this principle it was holden in the case in *Strange*, that the loser might make an affidavit of debt, and hold the winner to bail. This is also a remedial act, and there is a clear distinction between remedial and penal acts, that in the former, a debt is due to the party grieved before the commencement of the action, but not in the latter. As the money then was part of the estate of the bankrupt, the assignees had a right to sue for the recovery of it.

LAWRENCE, J., having argued the case while at the bar, gave no opinion.

Lord Ch. J. As I find that my Brothers are of a different opinion from me, I submit to their authority. Therefore let there be

Judgment for the Plaintiffs.

END OF EASTER TERM.

CASES

C A S E S

ARGUED AND DETERMINED

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IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER CHAMBER,

IN

Trinity Term,

In the Thirty-fourth Year of the Reign of GEORGE III.

PULLIN, One, &c. *against* STOKES, One, &c.

Wednesday,
June 25th.

In the Exchequer Chamber in Error.

IN this case, the first count of the declaration stated that the Defendant in error had recovered judgment in the Court of King's Bench against one *Mathias Taylor* for a debt of 400*l.* and 63*s.* costs, and had sued out a *fi. fa.* directed to the sheriff of *Somersetshire*, &c. “ and thereupon afterwards, and before “ the said sum of 400*l.* together with sixty-three shillings so as “ aforesaid recovered were made of the said goods and chattels “ of the said *Mathias Taylor*, and whilst the same writ was in “ force, to wit, on the 23d day of *April* in the year of our Lord “ one thousand * seven hundred and ninety-three, at the city of “ *Bristol* aforesaid, he the said *James* (the Plaintiff in error), in “ consideration that the said *Thomas* (the Defendant in error), “ at the special instance and request of the said *James*, would request of *C.* had requested the sheriff not to execute the writ, *C.* promised to pay *A.* the debt and costs, together with the sheriff's poundage, bailiff's fees, and other charges.

On a judgment by default and error brought, the promise was holden to be binding on *C.*, though it was not averred that the sheriff did in fact desist from the execution, nor what the amount of the poundage, &c. was, nor that the Defendant had notice of such amount.

(a) [Accord. *Myddleton v. Wynn*, Willes, 597. *Humble v. Bland*, 6 T. R. [* 313] 255.]

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“ then and there withdraw the said execution, and would for-
 “ bear and desist from further executing the said writ, under-
 “ took to indemnify the said *Thomas* against any loss or damage
 “ that might happen in consequence of his withdrawing the
 “ execution then levied, and did promise to pay and to satisfy
 “ to him the sum of 225*l.* 10*s.* being for principal, interest and
 “ costs due to him from the said *Mathias Taylor*, together also
 “ with sheriff’s poundage, bailiff’s fees, and other incidental
 “ charges, on the 14th day of *May* then next, to wit, at *Bristol*
 “ aforesaid ; and the said *Thomas* in fact says, that he confiding
 “ in the promise and undertaking of the said *James* in form
 “ aforesaid made, afterwards, to wit, on the same day and year
 “ last aforesaid, did withdraw the said execution, and did for-
 “ bear and desist from executing the said writ, and the said
 “ *Thomas* in fact says, that he hath not yet been paid and sa-
 “ tisfied the said sum of 400*l.* and sixty-three shillings, or any
 “ part thereof, so as aforesaid recovered by him against the
 “ said *Mathias Taylor*, but the same and every part thereof
 “ still remains due and unsatisfied, whereof the said *James* af-
 “ terwards, to wit, on the said 14th day of *May* in the year
 “ aforesaid, and often afterwards, to wit, at *Bristol* aforesaid,
 “ had notice, yet the said *James* not regarding his promise, &c.”

The second count, after stating similar matter of inducement,
 went on, “ and thereupon afterwards, and before the said last-
 “ mentioned sum of four hundred pounds, together with sixty-
 “ three shillings, were made of the goods and chattels of the
 “ said *Mathias Taylor*, and whilst the last-mentioned writ was
 “ in force, to wit, on the said 23d day of *April* in the said
 “ year of our Lord one thousand seven hundred and ninety-
 “ three, at *Bristol* aforesaid, he the said *James* in consideration
 “ that the said *Thomas*, at the like special instance and request
 “ of the said *James*, had then and there *requested the said sheriff*
 “ *to forbear and desist from executing the said writ*, undertook
 “ and to the said *Thomas* then and there faithfully promised to
 “ pay him the sum of two hundred and twenty-five pounds, and
 “ ten shillings, being for principal, interest and costs due to
 “ him from the said *Mathias Taylor*, together with sheriff’s
 “ poundage, bailiff’s fees, and other incidental charges, on the
 “ 14th day of *May* then next at the city of *Bristol* aforesaid, in
 “ the county of the same city, &c.” There were also the com-
 mon counts.

The

The Plaintiff in error let judgment go by default in the court below, and having brought a writ of error, assigned the common errors, and “that the said *James Pullin* (the Plaintiff in error), is not in, or by the judgment aforesaid, amerced or declared or adjudged to be *in misericordiâ* or mercy, but on the contrary the said *Thomas Stokes* (the Defendant in error) is adjudged to be in mercy.”

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This was argued by *Lawes* for the Plaintiff in error, who contended that the judgment was erroneous on two grounds:—

1. Because the Defendant in the action was *in misericordiâ* instead of the Plaintiff.
2. Because the second count was bad for want of a consideration, and also for want of averments; and the damages being general, if either count were defective, it was a good reason for reversing the judgment.

1. This is not a case within the statute 16 and 17 *Car. 2. c. 8.*, which indeed enacts, “that no judgment shall be reversed for want of *miser-*
“*ricordiâ* or *capiatur*, or by reason that a *capiatur* is entered
“for a *misericordiâ* or a *misericordiâ* is entered where a *capia-*
“*tur* ought to have been entered”; but here the *misericordiâ* is annexed to the wrong person, to the Defendant instead of the Plaintiff, a fault for which the statute does not provide a remedy.

2. A consideration necessary to support an assumpsit must be such as is either beneficial to one party or detrimental to the other. Now in the second count it is merely stated, that the Defendant, in consideration that the Plaintiff, at his special instance and request, *had requested* the sheriff to forbear from executing the writ, promised to pay the debt and costs, together with sheriff’s poundage, bailiff’s fees, and other incidental charges, &c.; but it is not averred that the sheriff did actually forbear; if he did not, there was no detriment to the Plaintiff, and clearly the Defendant in either case received no benefit. The Plaintiff ought also to have shewn that the sheriff was bound to attend to his request, if it had been made, otherwise the consideration fails. But a sheriff is not bound to attend to such a request, after the writ is delivered to him; as on the one hand he cannot refuse to execute the process of the Court, so on the other, he has a right to go on with the execution to secure his poundage, which arises on the fact of seizure. In 1 *Roll. Abr. 23. c. 27.* it is said, that “if *A.* lease land to *B.* at
“will, and *A.* promise *B.*, that in consideration that he will sur-
“render the estate at will to him, that *A.* will provide a par-
z 2 “sonage

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“sonage for *I. S.*, this is not a good consideration to have an action, because he may determine the lease at will at his “pleasure”; so in the present case, the Plaintiff might have revoked his request to the sheriff immediately after he had made it. Another defect in the count is, that though it is stated that the Defendant undertook to pay the poundage, bailiff’s fees, and charges, there is no averment what the amount of the poundage, &c. was, or that he had notice of it; for as he could not of himself know that amount, there could be no default on his part till notice was given him of the sum he was to pay. *Hardr.* 42.

Praed, contra. With regard to the first objection taken on the other side, it seems only necessary to observe, that the statute 16 and 17 *Car.* 2. after specifying the objections which shall not prevail to reverse a judgment, goes on to say, “all such omissions, variances, defects, and *all other matters of like nature*, not being against the right of the matter of the suit, nor whereby the issue or trial are altered, shall be amended by the justices or other judges of the courts where such judgments are or shall be given, or *whereunto the record is or shall be removed by writ of error.*” The *stat.* also 27 *Eliz.* c. 8. which first instituted the Court of Exchequer Chamber as a Court of Appeal from the King’s Bench, expressly “excepts errors to be assigned, for any want of form in any writ, return, plaint, bill, declaration, or other pleading, process, verdict or proceeding whatever”; and the 4 *Anne*, c. 16. s. 2. extends the statutes of *Jeofail* to judgments by default.

As to the second point, supposing for the sake of argument, that the second count were defective, yet the first is good, and a court of error may award a *venire de novo* to assess damages on that count. *Grant v. Astle*, *Dougl.* 722. But in truth there is a good consideration disclosed on the second count. The slightest detriment to the Plaintiff is sufficient, 3 *Burr.* 1673, and here it is to be presumed that the sheriff did not proceed, for if he had so done after the Plaintiff’s request he would have been liable to have the proceedings set aside with costs. With respect to the notice, the amount of the poundage, &c., was a fact as much within the knowledge of one party as the other.

The Court held that all the objections failed: that clearly there could be no error assigned with respect to the *misericordiâ*; that as to the consideration of the promise in the second count, it

was

was sufficient to state the request to forbear, if the contrary did not appear, that is, that the sheriff did not desist from proceeding in the execution; and that though the want of statement of notice might have been a ground of special demurrer, yet as the amount of the poundage was capable of being ascertained on a writ of inquiry, it was not a substantial objection in error.

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Judgment affirmed.

GOODALL *against* SKELTON.

Saturday,
June 28th.

THIS was an action for goods sold and delivered, in which a verdict was found for the Plaintiff, with liberty for the Defendant to move for a new trial or a nonsuit, in case the Court should be of opinion, on the report of the evidence, that the action could not be maintained.

The material facts which appeared from Mr. J. Ashhurst's report, were, that the plaintiff had agreed to sell a quantity of wool to the Defendant, that a shilling earnest was paid on the part of the Defendant to bind the bargain, that the wool was packed in cloths furnished by the Defendant for that purpose, and left at a hovel belonging to the Plaintiff, and that the Defendant was to send his waggon in a few days to take it away. But while the Defendant's servant was weighing and packing

A. agrees to sell goods to *B.* who pays a certain sum of money as earnest; the goods are packed in cloths furnished by *B.* and deposited in a building belonging to *A.* till *B.* shall send for them, but *A.* declares at the same time that they

shall not be carried away till he is paid. This is *not a delivery to B. (a).*

(a) [The question as to the delivery of goods arises in many different ways:—

1. What delivery is sufficient to complete the contract, so as to pass the property to the purchaser. *Hanson v. Meyer*, 6 East, 614. *Rugg v. Minett*, 11 East, 210. *Wallace v. Breeds*, 13 East, 522. *Busk v. Davis*, 2 M. & S. 397. *Zagury v. Farnell*, 2 Campb. N. P. C. 240. *Austen v. Craven*, 4 Taunt. 644. *White v. Wiles*, 5 Taunt. 176.

2. What delivery is sufficient to defeat the right of stoppage in transitu. *Hammond v. Anderson*, 1 Bos. & Pul. N. R. 69. *Scott v. Pettit*, 3 Bos. & Pul. 469. *Whitehouse v. Frost*, 12 East, 614. *Stoveld v. Hughes*, 14 East, 308. *Hurry v. Mangles*, 1 Campb. N. P. C. 452. *Harman v.*

Anderson, 2 Campb. N. P. C. 242. *Withers v. Lyss*, 4 Campb. N. P. C. 237. *Spear v. Travers*, 4 Campb. N. P. C. 251. *Lucas v. Dorrein*, 1 B. Moore, 29. *Green v. Haythorne*, 1 Stark. N. P. C. 447. *Hawes v. Watson*, 2 B. & C. 540. 1 R. & M. N. P. C. 6. and see the note there.

3. What delivery is sufficient to constitute an acceptance of goods under the Statute of Frauds. *Chaplin v. Rogers*, 1 East, 192. *Elmore v. Stone*, 1 Taunt. 458. *Howe v. Palmer*, 5 B. & A. 321. *Tempest v. Fitzgerald*, *id.* 680. *Hanson v. Armitage*, 5 B. & A. 557. *Carter v. Toussaint*, 5 B. & A. 855. *Baldley v. Parker*, 2 B. & C. 57. *Bentall v. Burn*, 5 B. & C. 423. *Phillips v. Bistolli*, 2 B. & C. 511.]

it,

1794. it, and proposing to the Plaintiff to fix the time when the waggon should come, the Plaintiff declared that "it should not go off his premises till he had the money for it."

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Le Blanc, Serjt., shewed cause against the rule, by contending that as the wool was packed in the Defendant's cloths, and deposited in a particular place till his waggon should come and take it away, there was a delivery to him. But the Court (absent the Lord Chief Justice) were so clearly of a different opinion, that they stopped the counsel on the other side.

BULLER, J. In general, in questions of this sort, the usage of trade is resorted to in order to shew whether there has been a delivery or not: as in the case of wharfs and the like. But here the evidence is that the Plaintiff peremptorily insisted on not parting with the goods till he was paid; clearly therefore there was no delivery.

[317] HEATH, J. The Plaintiff seems to me to have countermanded the delivery of the wool.

ROOKE, J., of the same opinion. The Plaintiff had a right over the goods at the time, and if so, they were not delivered; for if they had been delivered, that right would have been in the Defendant.

Rule absolute for a nonsuit.

Tuesday,
July 1st.

LYNN and Another *against* BRUCE.

A. declared, that in consideration that he at the request of *B.* had consented and agreed to accept and receive from *B.* a composition of so much in the pound upon a certain sum of money owing from *B.* to *A.* in full satisfac-

tion and discharge of the debt, *B.* promised to pay the composition; this was not a good consideration to support an *assumpsit* against *B.*, a mere accord not being a ground of action (*a*).

THIS was an action of *assumpsit*. The first count of the declaration was on a forbearance to sue on a bond given by the Defendant to the Plaintiffs for 200*l*. The second was as follows: "and whereas also afterwards, &c. in consideration that the said *Robert* and *Thomas* (the Plaintiffs) at the special instance and request of the said *Charles* (the Defendant) had then and there consented and agreed to accept and receive, of and from the said *Charles*, a certain composition of fourteen shillings in the pound, and so in proportion for a lesser sum than a pound, upon a certain other sum of one hundred and five pounds five shillings and two pence, then due and owing from the said *Charles* to the said *Robert* and *Thomas*, upon and

(*a*) [Vide *James v. David*, 5 T. R. 141.]

by

by virtue of a certain other writing obligatory, bearing date, &c. made and executed by the said *Charles* to the said *Robert* and *Thomas*, whereby he became held and firmly bound to them, in the sum of two hundred pounds, in full *satisfaction and discharge* of the said last mentioned writing obligatory, and all monies due thereon, he the said *Charles* undertook and then and there faithfully promised the said *Robert* and *Thomas* to pay them the said composition of fourteen shillings in the pound, and so in proportion for a lesser sum than a pound, upon the said last mentioned sum of one hundred and five pounds five shillings and two pence, upon request; and the said *Robert* and *Thomas* in fact say, that the said composition of fourteen shillings in the pound, and so in proportion for a lesser sum than a pound, upon the said last mentioned sum of one hundred and five pounds five shillings and two pence, amounted to a large sum of money, to wit, the sum of seventy three pounds thirteen shillings and sixpence, to wit, at *Westminster* aforesaid, whereof the said *Charles* afterwards, to wit, on the same day and year last aforesaid, at *Westminster* aforesaid, had notice; and although the said *Charles* hath paid to the said *Robert* and *Thomas* a certain sum of money, to wit, the sum of seventy pounds and six shillings, part of the said last mentioned sum of seventy-three pounds thirteen shillings and six pence, the amount of the said last mentioned composition, yet the said *Charles* not regarding, &c. hath not yet paid the sum of three pounds seven shillings and six pence, being the residue of the said sum of seventy-three pounds thirteen shillings and sixpence, the composition last aforesaid, or any part thereof, &c."

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A verdict having been found for the Plaintiffs on the whole declaration, a motion was made in arrest of judgment on the ground of the insufficiency of the second count, and after argument the opinion of the Court was thus delivered by

Lord Chief Justice EYRE. This is a motion made in arrest of judgment, on an objection to the second count of the declaration. The substance of that count is, that in consideration that the Plaintiff at the Defendant's request, had consented and *agreed to accept and receive* from the Defendant a composition of fourteen shillings in the pound, and so in proportion for a lesser sum than a pound, upon 105*l.* 5*s.* 2*d.* due from the Defendant to the Plaintiff on a bond dated the 30th *March* 1792 for

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for 200*l.*, in full satisfaction and discharge of the bond and all money due thereon, the Defendant promised to pay the said composition. It is then averred, that the composition amounted to 73*l.* 13*s.* 6*d.*, and that the Defendant had paid the Plaintiff 70*l.* 6*s.*, part thereof. The breach is, that he did not pay 3*l.* 7*s.* 6*d.* the residue. This will be found to be a very clear case, when the nature of the objection is understood. The consideration of the promise is, as stated in this count, on an agreement to accept a composition in satisfaction of a debt. If this is an agreement which is binding, and can be enforced, it is a good consideration. If it is not binding, and cannot be enforced, it is not a good consideration. It was settled in the case of *Allen v. Harris*, 1 Lord Raym. 122. upon consideration of all the cases, that upon an accord, which this is, no remedy lies; it was said, that the books are so numerous that an accord ought to be executed, that it was impossible to overturn all the authorities: the expression is, “overthrow all the books.” It was added, that if it had been a new point, it might have been worthy of consideration. But we think it was rightly settled upon sound principles. *Interest reipublicæ ut sit finis litium*: accord *executed* is satisfaction: accord *executory* is only substituting one cause of action in the room of another, which might go on to any extent. The cases in which the question has been raised, whether an accord executory could be enforced, and in which it has been so often determined that it could not, have been cases in which it has been pleaded in bar of the original action. But the reason given in three of the cases in 1 Roll. Abr. title *Accord*, pl. 11, 12, 13. is, because the Plaintiff hath not any remedy for the whole, or where part has been performed for that which is not performed; which goes directly to the gist of this action, as it is stated in the count objected to. This is an action brought to recover damages, for that part of the accord which has not been performed. But an accord must be so completely executed in all its parts, before it can produce legal obligation or legal effect, that in *Peyton’s case*, 5 Co. 79. b. it was holden, that where part of the accord had been executed, tender of the residue would not be sufficient to make it a bar to the action, but that there must be an acceptance in satisfaction. There are two cases in *Cro. Eliz.* 304, 305, to the same effect. It was argued according to the cases in *Roll. Abr.* that an accord executory in any part, is
no

no bar, because no remedy lies for it for the Plaintiff. Perhaps it would be a better way of putting the argument to say that no remedy lies for it for the Plaintiff, because it is no bar. But put either way, it concludes in support of the objection to the second count in this declaration, and consequently the judgment must be arrested.

Rule absolute to arrest the judgment.

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NAISH *against* TATLOCK and Others, Assignees of
LEDIARD a Bankrupt.

Wednesday,
July 9th.

IN this action for use and occupation, the first count of the declaration stated that the Defendants "were indebted to the Plaintiff in the sum of seventy pounds of lawful money of *Great Britain, for the use and occupation of two counting houses, one dining room, and one chamber, parcel of a certain messuage or tenement with the appurtenances, of the Plaintiff, situate &c. before that time used, occupied, possessed and enjoyed, *as well by one Thomas Lediard, whose term and estate therein the Defendants afterwards had, as by the Defendants, at their special instance and request*, for a long space of time then elapsed, from and under, and *as tenants thereof respectively*, to the Plaintiff, and by her permission; and being so indebted, the Defendants undertook, and to the Plaintiff faithfully promised to pay, &c." The second count was on a *quantum meruit* for the same use and occupation by *Lediard*, "whose estate, term and interest the Defendants had," and by the Defendants. There were also the common counts. The general issue was pleaded, and 12*l.* paid into Court. After argument and time taken to consider, the judgment of the Court was thus given by

A tenant from year to year of a house at a yearly rent, becomes a bankrupt in the middle of the year, and his assignees enter and keep possession for the remainder of the year. The lessor cannot maintain an action for use and occupation against the assignees, for the bankrupt's occupation as well as their own, without proving *their special instance and request* for the bankrupt to occupy, during the time that elapsed before the bankruptcy (a).

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Lord Chief Justice EYRE. The verdict passed for the Plaintiff in this cause, subject to the opinion of the Court on the matter of law, arising upon the facts appearing in evidence and found by the jury, considered with reference to the declaration. It is stated in the first count of this declaration, that the Defendants were indebted to the Plaintiff in seventy pounds, for

(a) [So a husband is not liable for the use and occupation of a house by his wife *dum sola*. *Richardson v. Hall*, 1 Brod. & Bing. 50. See *Gib-*

son v. Courthorpe, 1 Dow. & Ryl. 205. which appears to be at variance with the principal case.]

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the use and occupation of certain apartments in his house before that time used, occupied, possessed, and enjoyed, as well by one *Thomas Lediard*, whose term and estate therein the Defendants afterwards had, as by the Defendants at their special instance and request, for one year then elapsed, from and under, and as tenants thereof respectively to the Plaintiff, and by her permission, and that being so indebted, they promised to pay. The second count is upon a *quantum meruit*, in consideration that the Plaintiff at the like special instance and request of the Defendants, had permitted the said *Thomas Lediard*, whose estate, term, and interest, the Defendants had as well as the Defendants themselves respectively, to have, use, and occupy the same apartments, and that *Lediard* and the Defendants respectively, had accordingly had, used, and occupied the same for a year, by such permission of the Plaintiff. The material facts of the case were, that after *Lediard* had occupied these apartments for a certain part of the year under an agreement to pay seventy pounds a year for them, he became a bankrupt, and the Defendants, who were his assignees, then entered into possession and continued in the occupation of them for the rest of the year; and that after the expiration of the year, Mr. *Tatlock*, one of the Defendants, wrote the following note to Mr. *Ward*, the solicitor for the commission of bankrupt against *Lediard*; “ Mr. *Tatlock’s* respectful compliments to Mr. *Ward*, “ the bearer is a Mrs. *Naish*, a widow lady, whom Mr. *Lediard* “ rented his house in *Austin Friars* of; there is due to her for “ rent, fifty pounds, we having paid her twenty pounds since “ the commission, there is also five pounds fifteen shillings and “ six-pence for coals likewise for our use since the commission; “ now I wish you to give an order upon Mr. *Tatlock* for the “ above, as we certainly are bound to pay her. *London*, 20th “ *July*, 1792.” This paper was delivered to Mrs. *Naish* the Plaintiff, by *Tatlock*, to be delivered to *Ward*, and it was delivered, but some dispute arising, the fifty pounds were not paid, in consequence of which this action was brought, and then a proportion of the annual rent of seventy pounds for that part of the year during which the Defendants were in the occupation of the premises, was paid into Court. Upon this state of facts, it was insisted, on the part of the Defendants, that the Plaintiff had not proved her case stated in the declaration. The question was saved for the opinion of the Court, after

after it had been left to the jury to say distinctly, whether the agreement was or was not to pay the rent annually, which they found in the affirmative, and whether the seventy pounds mentioned in the note of the 20th *July*, 1792, was the year's rent, or was a sum which the Defendants had agreed to pay for their own occupation; as to which the jury found, that it was the rent for the whole year, including the time of *Lediard's* occupation. At the trial, I was strongly inclined to agree in opinion with Mr. *Tatlock*, that the real merits of the case were on the side of the Plaintiff. It was at the same time apparent, that they were very much entangled and brought into great hazard in this form of action. This induced me strongly to recommend a compromise between the parties, which has not been acceded to; we are therefore called upon to decide the strict question of law, and after having heard a very full discussion of this case from the Bar, and taken time to consider of it, we find ourselves obliged to pronounce that the evidence on the part of the Plaintiff is not sufficient to maintain this action. It is stated in both the counts, of which I have given an abridgment, that the Plaintiff's demand is founded upon a use and occupation by *Lediard* for a part of the year, and by the Defendants for the residue of the year, both occupations being had by the permission of the Plaintiff, *at the special instance and request* of the Defendants. These latter words, often mere words of form, are here words of substance and operative, connecting the occupation of the Defendants, for which they were bound to make a satisfaction, with the occupation of *Lediard*, a stranger, for whose occupation, *primâ facie* at least, the Defendants were not bound to make a satisfaction. In point of fact, it was not at the request of the Defendants, that *Lediard* was permitted to occupy; the Defendants had no relation to *Lediard*, but as his assignees, and that relation did not commence till the close of his occupation; that relation therefore, alone, could not have the effect of making them personally liable to answer for his occupation before his bankruptcy. The averment that he had been permitted to occupy at the request of the Defendants, is therefore substance, and not mere form, and a failure in the proof of it is fatal. The framer of this declaration seems to have been aware of this difficulty, and to have endeavoured to obviate it by throwing into the declaration, the words "*whose term and estate therein*" in the first count,

and

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and the words "*whose estate term and interest*" in the second, the Defendants had. This very loose and general averment seems to have been calculated to facilitate the passage of the other averment "*of the Defendant's request*" through the cause at *nisi prius*; and if it had passed smoothly there, would probably have been the averment which would have been relied upon after a verdict, and this last would have been discarded. Loose, informal, and indistinct as it is, it might serve to introduce at the trial, that *Lediard* was a tenant for a year at a rent of seventy pounds payable at the end of the year, and that the assignees having entered into possession as assignees, entered under that demise and became assignees of the lease, and bound to pay the rent which became due after the assignment. It might then be with great colour urged, that rent due is recoverable in an action for use and occupation, and if the rent is really due, the manner of stating the use and occupation seems to have more form than substance in it. I was for a time inclined so to consider the case, but upon further consideration of the nature of the action for use and occupation, and of the scope and purview of the statute 11 *Geo. 2.* we are of opinion, that the circumstances under which the Defendants succeeded to the occupation of the premises will not prove or dispense with the proof, that *Lediard's* occupation was at the request of the Defendants. The action for use and occupation is in its own nature collateral to the action on a contract for rent upon a demise, and it was so holden in the case of *Johnson v. May*, 3 *Lev.* 150.: if the Defendant did in fact use and occupy by the permission of the Plaintiff, and had expressly promised to pay, though the Plaintiff had no title or perhaps an equitable title only, the action lay (a).

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Under the statute, a landlord who has rent owing to him is allowed to recover, not the rent, but an equivalent for the rent, a reasonable satisfaction for the use and occupation of the premises which have been holden and enjoyed under the demise, by the action for the use and occupation; and it is provided on his behalf, that if the demise be produced against him it shall not defeat his action, as it would have done before the statute, but the fixed rent shall only be used as a *medium*, by which the uncertain damages to be recovered in this form of action shall be liquidated. What is given by this statute? A

(a) [Vide *Hall v. Vaughan*, 6 *Price*, 157.]

reasonable

reasonable satisfaction for the use and occupation, is the thing intended to be given, the form of action marked out (being enlarged by a necessary construction, so as to be allowed to be maintained without an express promise) is the proper form in which such reasonable satisfaction is to be recovered; but the reasonable satisfaction which in its own nature must apply to something specific, by which it can be estimated, being here given for use and occupation, and for nothing else, it is a remedy which in its own nature is not co-extensive with a contract for rent, nor does it seem to have been within the scope and purview of the act, to make this remedy co-extensive with all the remedies for the recovery of rents claimed to be due, by the mere force of the contract for rent. The statute meant to provide an easy remedy in the simple case of actual occupation, leaving other more complicated cases to their ordinary remedy. In the case now under consideration, the Plaintiff must be left to such other remedy as she may be advised to pursue: she cannot recover in an action for use and occupation without proof of the use and occupation alleged, and if she can recover at all in this form of action, against one man for use and occupation by another, (as to which we give no opinion,) it must be upon the ground of that occupation having been permitted at his request, and that request must be proved (*a*). The consequence is, that a nonsuit must be entered, and the *postea* delivered to the Defendants.

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Postea to the Defendants.

(*a*) [Vide *Bull v. Sibbs*, 8 T. R. 327.]

CALLAND *against* TROWARD.

Wednesday,
July 9th.

[6 T. R. 439. Affirmed on Error in K. B. and afterwards in Dom. Proc. *ib.* 778. 8 Br. P. Ca. 71, S. C.]

THIS was an action of covenant, and the declaration stated “ that by a certain indenture made at *London* aforesaid, to wit in the parish of Saint *Mary-le-Bow* in the ward of *Cheap* on the 26th day of *July* in the year of our Lord 1791, between the said *Richard* (the Defendant) of the one part, and the said which the living becomes vacant, and the King is entitled to present; the grantee may present on the next vacancy occasioned by the death or resignation of the King’s presentee.]

[If after a grant of the next presentation to a living, the incumbent be made a bishop, by

John

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John Calland of the other part, one part of which said indenture sealed with the seal of the said *Richard*, the said *John* now brings here into Court, the date whereof is the same day and year aforesaid, reciting that the said *Richard* was seised in fee simple of and in the advowson of the rectory, parsonage, or parish church of *Blechingley* in the county of *Surry*, of which living the reverend *Matthew Kenrick* doctor in divinity was then the incumbent, and further reciting, that the said *John* had contracted and agreed with the said *Richard* for the absolute purchase of the said advowson, at or for the price or sum of 7000*l.*, it is witnessed that for and in consideration of the sum of 7000*l.* of lawful money of *Great Britain*, to the said *Richard* in hand well and truly paid by the said *John*, at or before the sealing and delivery of the said indenture, the payment and receipt of which said sum of money the said *Richard* did thereby acknowledge, and of and from the same and every part thereof did acquit, release and discharge the said *John*, his heirs, executors, administrators and assigns, and every of them for ever, by the said indenture, he the said *Richard* had granted, bargained and sold, and by that indenture did grant, bargain and sell unto the said *John*, and to his heirs and assigns, all that the advowson, donation, free disposition, and right of patronage and presentation in and to the rectory, parsonage, or parish church of *Blechingley*, otherwise *Bletchingley*, otherwise *Blechingleigh*, in the said county of *Surry*, with its appurtenances, and the reversion and reversions, remainder and remainders, and profits thereof, and all the estate, right, title, interest, trust, property, claim and demand whatsoever, both at law and in equity of him the said *Richard*, of, in, to or out of the said advowson or right of patronage and presentation to the rectory or parsonage of the said parish church, and other the premises thereby bargained and sold, or expressed and intended so to be, with the appurtenances, to have and to hold the said advowson, donation, free disposition, right of patronage and presentation of, in and to the said rectory, parsonage, or parish church of the said parish of *Blechingley*, otherwise *Bletchingley*, otherwise *Blechingleigh*, and other the hereditaments and premises thereby bargained and sold, or expressed or intended so to be, with their and every of their rights, members and appurtenances, unto the said *John*, his heirs and assigns, to the only proper use and behoof of him the said *John*, his heirs and assigns

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signs for ever. And the said *Richard* for himself, his heirs, executors and administrators did *covenant, promise and agree, to and with the said John, his heirs and assigns, by the said indenture in manner following, that is to say, that he the said Richard at the time of the sealing and delivery of the said indenture, was and stood lawfully, rightfully and absolutely seised of and in, or otherwise well and sufficiently intitled unto the said advowson, or right of patronage and presentation, hereditaments and premises, thereby bargained and sold, or expressed or intended so to be, and every part thereof, of and in a good, sure, perfect, lawful, absolute and indefeasible estate of inheritance in fee simple, without any manner of condition, contingent proviso, power of revocation, limitation, use or trust, or other matter, restraint, cause, or thing whatsoever, to alter, change, charge, revoke, defeat, determine, or make void the same*; and also that he the said *Richard* then had in himself alone, good right, full power and lawful authority, to bargain and sell the said advowson, right of patronage and presentation, hereditaments and premises therein before bargained and sold, or expressed or intended so to be, and every of them, and every part and parcel thereof, with the appurtenances, unto the said *John*, his heirs and assigns for ever, in manner aforesaid, and according to the true intent and meaning of the said indenture. And likewise that the said advowson, right of patronage and presentation, hereditaments and premises, thereby bargained and sold, or expressed or intended so to be, and every part and parcel thereof, were then free and clear of and from all charges, and incumbrances whatsoever, as by the said last mentioned indenture, amongst other things, more fully appears. And the said *John* in fact says, that before the said *Richard* had any thing in the said advowson, and before the making of the said indenture, to wit, on the 30th day of *May* in the year of our Lord 1745, Sir *Kenrick Clayton* Baronet was seised of the advowson of the church aforesaid as of one in gross by itself, as of fee and right, and being so seised thereof, he the said Sir *Kenrick Clayton*, afterwards, and before the making of the said indenture, to wit on the day and year last aforesaid, at *London* aforesaid, in the parish and ward aforesaid, the said church then being full of one *John Thomas* clerk, the then incumbent thereof, by a certain deed-poll bearing date the same day and year last aforesaid, sealed with the seal of him the said Sir *Kenrick*, for and in consideration of

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of the counsel and advice of one *Mathew Kenrick*, Esq. given to the said *Sir Kenrick Clayton*, in his law and other affairs, and for and in consideration of the sum of five shillings of lawful money of *Great Britain*, to the said *Sir Kenrick Clayton* in hand well and truly paid, by the said *Mathew Kenrick*, Esq.; granted unto the said *Mathew Kenrick*, Esq. his executors, administrators and assigns, the next presentation, donation, and free disposition, of and to the rectory of the said parish church of *Blechingley*, otherwise *Bletchingly*, otherwise *Bletchingleigh* aforesaid, to have and to hold the said next presentation, donation, and free disposition aforesaid, to the said *Mathew Kenrick*, Esq. his executors, administrators and assigns, to present one fit and able person to the said rectory and parsonage of *Blechingley*, otherwise *Bletchingly*, otherwise *Bletchingleigh* aforesaid, and all other things which should be necessary to be done in and about the premises, to do and accomplish, *as fully, freely and entirely, as the said Sir Kenrick Clayton or his heirs, might or could do or have done*, if the said deed-poll had not been made, as by the said deed-poll, reference being thereunto had, will appear; by virtue whereof the said *Mathew Kenrick*, Esq. became and was possessed of and intitled to the next presentation, donation and free disposition, so granted to him as aforesaid; and the said *John Calland* farther saith, that the said church being so full of the said *John Thomas* as aforesaid, and the said *Mathew Kenrick*, Esq. being so intitled as aforesaid, he the said *John Thomas* was afterwards, and before the making of the said indenture to wit on the 1st day of June in the year of our Lord 1774 rightfully and canonically created and consecrated Bishop of the Bishoprick of Rochester, and the said church thereupon then became vacant by the promotion of the said *John Thomas* to the said Bishoprick of Rochester, whereby our present sovereign Lord the King by reason of his royal prerogative, became entitled to present a fit person to the church aforesaid so vacant, and thereupon his said Majesty by his royal prerogative, before the making of the said indenture, that is to say on the same day and year last aforesaid by his letters patent sealed with the seal of Great Britain, presented the said *Mathew Kenrick* in the said indenture mentioned, his clerk, to the said church, so being vacant as aforesaid, that is to say at *London* aforesaid, in the parish and ward aforesaid, who upon the said presentation of our said Lord the King, was afterwards and before the making of

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of the said indenture, to wit, on the day and year last aforesaid, admitted, instituted and inducted into the same in the time of peace, in the reign of our Lord the present king, and thereby became and was, and continually from thence until the time of making the said indenture, and from thence hitherto hath been and still is, the parson and incumbent of the said church, on the said presentation of our said Lord the King ; and the said church being so full of the said last mentioned *Matthew Kenrick*, the incumbent thereof as aforesaid, and the said *Matthew Kenrick*, Esquire, being so possessed of and entitled to the next presentation, donation, and free disposition granted to him as aforesaid, he the said *Matthew Kenrick*, Esquire, afterwards, and before the making of the said indenture now brought here into Court, to wit, on the 11th day of *August* in the year of our Lord 1777 at *London* aforesaid, in the parish and ward aforesaid, by a certain indenture sealed with his seal, and made between the said *Matthew Kenrick*, Esquire, of the one part, and the said *Matthew Kenrick* the said clerk of the said church of the other part, for the considerations therein mentioned, granted and assigned unto the said *Matthew Kenrick* the said clerk of the said church, his executors, administrators and assigns, the said next presentation, donation and free disposition so granted to him the said *Matthew Kenrick*, Esquire, as aforesaid, to have and to hold the same to the said *Matthew Kenrick* the said clerk, his executors, administrators and assigns, as by the said last mentioned indenture, reference being thereunto had, may more fully appear, by virtue whereof, the said *Matthew Kenrick* the said clerk, became and was possessed of and entitled to, and from thence until, and at the time of making the said indenture now brought here into court, continued to be, and still is possessed of, and entitled to the next presentation, donation and free disposition, of and to the said church, to present a fit person thereto, contrary to the form and effect of the said indenture, now brought here into court, and of the said covenant of the said *Richard* in that behalf made as aforesaid ; and so the said *John Calland* saith, that the said *Richard* has not, although often requested, kept with the said *John Calland* his said covenant, so made with him as aforesaid, but has broken the same, and to keep the same with him has hitherto wholly refused, and still doth refuse, to the damage of the said *John Calland* of 10,000*l.* and therefore he brings suit, &c.

To this declaration there was a general demurrer, which in

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the present term came on to be argued. On behalf of the Defendant, *Bond*, Serjt., contended that no breach of covenant was stated in the declaration, so as to enable the plaintiff to maintain the action. The ground on which the argument on the other side must rest, is that Sir *Kenrick Clayton* having granted the next presentation of the living to *Matthew Kenrick* prior to the transaction between the Plaintiff and the Defendant, the Defendant could not truly covenant that the advowson was free from "all manner of condition, contingent proviso, &c." But the effect of that grant, it is submitted, was done away by the intervention of the prerogative of the crown, on the promotion of *Thomas* the incumbent to the bishoprick of *Rochester*. The grantee could not have a greater interest than the grantor himself. Now the words of the deed are, "as fully, freely and entirely, as the said Sir *Kenrick Clayton* "or his heirs might or could have done, if the said deed poll had "not been made," but the right of Sir *Kenrick Clayton* the grantor was subject to the possible exertion of the royal prerogative, on the preferment of the incumbent. The term *next* presentation must be taken to mean, on the face of the grant, the presentation on the first vacancy that should happen, or none at all: but the presentation on the first vacancy was satisfied by the King's prerogative, which prevented the grant from taking effect. That this is the true construction of the grant appears from 1 *Bulstr.* 26. *Starkey v. Poole*, 7 *Co.* 28 a. *Baskerville's* case, *Bro. Abr. tit. Present. al Eglise*, pl. 52. *Co. Litt. b. Dyer*, 35 a. and the case cited in the margin, *Mich.* 9 *Jac.* in *C. B. Cro. Jac.* 691, *Woodley v. The Bishop of Exeter*, *Winch. Rep.* 94. S. C. If the case of *The Grocers' Company v. The Archbishop of Canterbury* (a) be cited on the other side, it is to be observed that in that case the authority of *Woodley v. The Bishop of Exeter* and the former cases is not expressly denied, but the Court proceeded on the ground that the act of law did not work an injury; there was no question there as to the construction of a deed, containing a grant of the next presentation as fully, freely, &c. as the grantor himself had it. There is therefore a material difference between that case and the present.

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Le Blanc, Serjt., *contra*. In the cases cited on the part of the Defendant, except that of *Woodley v. The Bishop of Exeter*, there was no question as to the prerogative of the crown,

(a) 2 *Black.* 770. 3 *Wils.* 214.

but

but the grantee of the next presentation, having neglected to take advantage of the first avoidance, was holden to have lost his turn by his own laches. Those cases are therefore inapplicable to the present. With respect to *Woodley v. The Bishop of Exeter*, it appears from comparing the two reports of it in *Cro. Jac.* and *Winch*, that the Court were inclined to be of opinion that the King had no right to present to a living on the promotion of the incumbent to a bishoprick, unless he were the patron of the living. But the law is now clearly otherwise; this therefore takes off from the authority of the other point there said to be decided, viz. that the grantee of the next avoidance must have the next or none at all, and must lose his right by the intervention of the prerogative, on the promotion of the incumbent to a bishoprick. And that authority is expressly contradicted by the anonymous note in the margin of *Dyer*, 228 b. (which is apparently the same case) where it is stated that the Court resolved, "that the grantee should have the next avoidance after the prerogative presentation, because that was the act of law, and the prerogative of the King, which excluded him from the first presentation, injures no one." If that note alludes to *Woodley v. The Bishop of Exeter*, it throws a doubt on the authenticity of the reports of that case in *Croke* and *Winch*; if it does not, it shews that the Court within a very short time decided the same point in a different manner: and being inserted among the notes of Chief Justice *Treby*, it seems to prove that it was agreeable to his opinion.

It is true that in *Co. Litt.* 478 and 9, cited on the other side, it is said, that "If a man seised of an advowson in fee by his deed granteth the next presentation to A., and before the church becometh void, by another deed grant the next presentation of the same church to B, the second grant is void, for A. had the same granted to him before; and the grantee shall not have the second avoidance, by construction to have the next avoidance which the grantor might lawfully grant, for the grant of the next avoidance doth not import the second presentation." Now in the case there put, the grantor having by his own act parted with the next presentation, has it not in him to grant. But Lord *Coke* goes on, "But if a man seised of an advowson in fee take wife, now by act in law is the wife intitled to the third presentation, if the husband die before. The husband grant the third presentation to an-

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 CALLAND "shall have the third presentation, and the grantee the fourth;
 against "for in this case it shall be taken the third presentation which
 TROWARD. "he might lawfully grant: and so note a diversity between a
 "title by act in law, and by act of the party; for the act in
 "law shall work no prejudice to the grantee." Now this distinction is applicable to the present case, the prerogative presentation of the crown being an act in law. And this principle was fully recognized in *The Grocers' Company v. The Archbishop of Canterbury*. The case too of the *Bishop of London v. The Mercers' Company*, 2 *Stra.* 925. proceeded on the ground of its being a clear rule of law, that the prerogative presentation of the crown, on the incumbent being created a bishop, did not break in upon any right to present by turns.

Cur. advis. vult.

Lord Chief Justice EYRE. The merits of this demurrer depend upon the question, whether the grant of the next presentation, donation and free disposition of and to the rectory of *Bletchingley*, is either satisfied or disappointed by the next presentation, happening to be a prerogative presentation, or an avoidance in consequence of the incumbent being made a bishop. The case has been argued on the part of the Defendant, upon a nice and literal construction of the grant against good sense and the plain intent of the parties to it. It is said that the grant being of the *next* presentation, the grantee can take nothing but the next presentation, and consequently if he cannot take *that*, he can take nothing. It is said likewise, that the *next* is the *first*, and that a grant of the next is not a grant of the second, or that which is not the next; and literally it certainly is not. But the language of a deed is to be expounded between the parties to it, and with reference to the subject matter of it. As between the grantor and grantee, where every thing is to be taken against the grantor, that his grant may take effect, is not this a grant of the first presentation, which it belonged to the owner of the inheritance of this advowson to make, and which he could lawfully, or at least could by possibility
 [331] make? The whole title being by law subject to a prerogative presentation paramount, or rather collateral to it, which suspends the effect of it, and prevents it from being productive for a time, and which is founded on the general law of the land, of which all take notice, and by which all are bound, could
 this

this prerogative presentation have been in the contemplation of the parties to this contract, unless for the purpose of being tacitly excepted out of it? And shall the general law of the land, contrary to one of its most established maxims, work to the prejudice of the grantee, by a strict and literal exposition of the words of the grant?

Grant imports covenant; and shall the grantor be construed to have contracted and bound himself to do that which by no possibility he could do, to grant that which by no possibility he could have to grant, and which both parties knew, at the time of the grant, that by no possibility he could have? A man may certainly take upon himself to grant that interest which is not in him, which he has not to grant; but ordinarily it will be an interest of such a nature, that by a possibility he might have it.

It was argued that the grantor of the next presentation might, by using other words, have effectually granted the next presentation which it should belong to the owner of the inheritance to make. Suppose he had said *his* next presentation, instead of *the* next presentation; no circumlocution could express with more certainty what it was that he meant to grant. We are then to examine the difference between the effect of the word *his* and that of the word *the*. I admit that the difference would be of great importance in some cases. If for instance, in an action of trespass for taking goods, the Plaintiff were to state in his declaration, that the Defendant had taken *the* goods, instead of *his* goods, it would be a fatal objection on the record, because it is necessary in such an action for the Plaintiff to shew that *his* goods have been taken. But if a man bargains and sells *the* goods described in the bill of sale, it will amount to the same thing as if he had said *his* goods. It is certainly true, that deeds are to be expounded with more strictness than wills, or other writings framed with less solemnity; but this strictness chiefly regards the technical sense of law terms: it never was the rule of construction of deeds, that the words were to be taken in their literal or grammatical sense, if the plain intent and meaning of the deed demanded that they should be understood in any other sense which the words would bear.

It must be admitted, that the exposition of this grant of the next presentation of the rectory of *Bletchingly* attempted by the Defendant, receives great countenance from the case of *Woodley*.

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ley v. The Bishop of Exeter, reported in *Cro. Jac. (a)*, and in *Winch (b)*; there, the Plaintiff intitled himself by a grant of the next avoidance of the church. The incumbent was created a bishop, and had a *commendam* for six years, and according to the report of the case in *Winch*, after the six years the King presented, and then the incumbent died, whereby the church became void, and the Plaintiff presented. The Court, consisting of *Hutton, Winch, and Hobart*, held, that when the incumbent is created a bishop, if the grantee of the next avoidance do not then present, he hath lost his presentation, for he ought to have the *next* avoidance, and can have no other, and that if the next avoidance should be taken from him by a former title, (except in dower only) statute, or by any other title whatever, he hath lost it for ever, for he cannot claim any by the grant, but the next; and they denied the case put by Lord *Coke, Co. Litt. 379 a.* that if one deviseth the third avoidance and dies, and the feme recover the third, the devisee should have the fourth. According to the report in *Croke, Hobart* said, that the presentee of the king being in the next turn after the grantor, the grantee hath no remedy, but must suffer the prejudice by reason of the prerogative. In *Winch's* report of this case, *Bro. Abr. tit. Present. pl. 52.* is cited, "If a man
 " grant the next presentation to *A.* and afterwards and before
 " avoidance he grants the next presentation to *B.*, the second
 " grant is void, for it was granted over by the grantor before;
 " and the second grantee shall not have the second presenta-
 " tion, for the grant does not import that." I agree that this case is law. Every grant may be defeated by an elder title. Perhaps dower is an elder title, and therefore we are not bound to maintain the case in *Co. Litt.* which is denied in *Woodley v. The Bishop of Exeter* to be law. If a man has not in him, in point of title, the thing which he grants, it is apparent that his grant cannot take effect. The fallacy of the argument is in the application of this doctrine to the case of a prerogative presentation intervening, which ought not to be considered as a presentation by an elder title, but as arising out of a prerogative right collateral to the title, operating not to defeat but to suspend the title, leaving every thing derived out of the title, or in any manner connected with it, to remain *in statu quo*. The

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(a) *Cro. Jac.* 691. (b) *Winch. Rep.* 94.

king presents, not by reason of title to the advowson, but *ratione prærogativæ suæ*.

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These observations furnish an answer to the case of *Woodley v. The Bishop of Exeter*; but *Winch*, who argued that case, puts a case which he admits to be law, and which is of itself sufficient to overturn that case. "I grant," says he, "that if two coparceners had an advowson and the eldest presented, and then she granted the next avoidance, that in this case the grantee shall have the next which may be granted, and the reason is, because she may not dispose of the estate of another." In order to reach the conclusion that the grantee shall have the next which the eldest could grant, it will be necessary to construe the grant of the next avoidance to be not literally a grant of the next avoidance, but of the next to which the grantor could lawfully present. This construction must be grounded upon the intent of the parties, and upon those rules stated by Lord Coke, *Co. Litt.* 183. "*Quælibet concessio fortissimè contra donatorem interpretanda est, et legis constructio non facit injuriam.*" If we inquire further into the effect of a prerogative presentation upon the title of the advowson, independent of the question of construction of the grant of the next presentation with which it is entangled in this case, we shall find, as I collect from some inquiries that I have made, that a prerogative presentation to a church of which the advowson is in common, has not in practice passed for the turn of the otherwise rightful patron. Instances have occurred in *London*, where the union of churches has occasioned a distribution of turns to present, and we all remember that in the case of the *Grocers' Company v. The Archbishop of Canterbury*, 2 *Black.* 770. the point was solemnly adjudged. In that case, all the principles which govern this case, except as to the construction of the grant, are recognized. It is there stated, that the prerogative right of presentation is not a right of patronage, not a right of eviction, nor an usurpation, but a contingent casual right arising upon a particular event; that it does not supply but only suspends or postpones the turn of the patron, and of all the patrons if more than one, and does not take away the right of one and leave the rest entire, which, say the Court, would be rank injustice, and this being the act of law, *nemini facit injuriam*. To this nothing can be added, there must be therefore

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Judgment for the Plaintiff.

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Wednesday,
July 9th.PINKERTON and Others, Assignees of GALE,
a Bankrupt, against MARSHALL.

A. having recovered a verdict for a certain sum of money against *B.*, *B.* commits an act of bankruptcy. Afterwards, *A.* having had no notice of the bankruptcy, gives time to *B.*, and instead of entering up judgment and suing out execution, takes a bill drawn by *B.* on *C.* at a distant period, for the amount of the sum recovered. This is not a payment protected by the stat. 19 Geo. 2. c. 32. *A.* therefore, is liable to refund the money received for the bill to the assignees of *B.* (a).

THIS was an action for money had and received to the use of the Plaintiffs as assignees of *Gale*, the circumstances of which were the following: at the Sittings after *Hilary* Term, 1793, *Marshall*, who was a ship owner, recovered a verdict against *Gale*, who was a merchant, in an action on a charter-party for 428*l.* 11*s.* 11*d.* Early in the next *April* *Gale* committed an act of bankruptcy; afterwards, *Marshall* having had no notice of the bankruptcy, was requested by *Gale* to give him time for the payment of the sum recovered by the verdict, instead of immediately entering up judgment and taking out execution. To this *Marshall* consented, on receiving a bill of exchange drawn by *Gale* in his favour on one *Younghusband*, who was a debtor of *Gale's* for that sum at four months after date, and on payment of the costs to the attorney. When the bill became due, it was paid by *Younghusband* by another bill drawn on Sir *James Esdaile* and Co. the amount of which, together with the costs, this action was brought to recover, and a verdict found for the Plaintiffs subject to the opinion of the Court, whether the debt for which the bill was given being for money recovered by a verdict for freight, was of such a nature that the payment of it was protected by stat. 19 Geo. 2. c. 32.

On the part of the Defendants, *Adair* and *Cockell*, Serjts., contended, that the case came within the provision of the statute. The words of it are, “ That no person who is or
“ shall be really and *bonâ fide* a creditor of any bankrupt, for
“ or in respect of goods really and *bonâ fide* sold to such bankrupt, or for or in respect of any bill or bills of exchange
“ really and *bonâ fide* drawn, negociated, or accepted by such
“ bankrupt in the usual or ordinary course of trade and dealing,
“ shall be liable to refund or repay to the assignee or assignees
“ of such bankrupt’s estate any money which before the suing

(a) [Vide *Cox v. Morgan*, 2 Bos. & Pul. 398. *Hovill v. Browning*, 7 East, 154. *Harwood v. Lomas*, 11 East, 127. And see the provision in the new Bankrupt Act, 6 Geo. 4. c. 16. s. 82. which makes valid all payments really and *bonâ fide* made, or which shall hereafter be made by any bank-

rupt or by any person on his behalf, before the date and issuing of the commission against such bankrupt to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor) and provided the person had not notice of any act of bankruptcy.]

“ forth

“ forth of such commission was really and *bonâ fide*, and in
 “ *the usual and ordinary course of* trade and dealing* received by
 “ such person of any such bankrupt before such time as the
 “ person receiving the same shall know, understand, or have
 “ notice that he is become a bankrupt, or that he is in insolvent
 “ circumstances.” Here the bankrupt was really and *bonâ fide*
 indebted to *Marshall* in a large sum for freight, a debt contracted
 in the usual and ordinary course of trade and dealing; and it
 was in discharge of this debt ascertained by the judgment of
 the Court, that the bill of exchange was drawn, and the pay-
 ment made. The statute being of a remedial nature ought to
 receive a liberal construction, so as best to answer the end for
 which it was designed. The payment being enforced by the
 sentence of a Court could not be resisted, and compulsory pay-
 ments were holden to be within the statute, in the case of
Holmes and others, assignees of M'Dougall v. Winnington (a),
 in *Scacc. Hil. 30 Geo. 3.* which recognized and confirmed that
 of *Calvert and others, assignees of Jones, v. Lingard at Nisi Prius*,
 tried before Lord *Loughborough*, 1783.

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Bond, Serjt., contra. By the assignment of the commission-
 ers, all the property of the bankrupt is vested in the assignees
 by relation to the act of bankruptcy, so as to defeat all inter-
 mediate acts done by the bankrupt to dispose of his property.
 This being the general rule, the statutes which introduce an
 exception to it are to be strictly construed, and not to be ex-
 tended beyond the particular cases for which they were made.
 The 1 *Jac. 1. c. 15.* is for the protection of debtors to the bank-
 rupt, who shall have paid money to him without notice of the
 bankruptcy, and this in all cases. The 19 *Geo. 2. c. 32.* is con-
 fined to particular instances of payments made *by* the bankrupt,
 and the present case cannot be brought by any rule of construc-
 tion within either of those instances. That this is the true inter-
 pretation of the statute 19 *Geo. 2.* appears from *Vernon v. Hall*,
 2 *Term Rep. B. R. 648.* and *Bradley v. Clark*, 5 *Term Rep.*
B. R. 197 (b).

The Court, after consideration, on this day declared, that
 they thought the authorities of *Vernon v. Hall*, and *Bradley v.*
Clark, were decisive of the point in dispute, particularly the

(a) Those were both cases in which
 payments compelled by legal process,
 were holden to be within the mean-
 ing of the stat. 19 *Geo. 2. c. 32.*

(b) [See also *Copeland v. Stein*, 8
 T. R. 199.]

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former, where, as well as in this instance, a personal credit was given to the bankrupt; that if the payment by the bankrupt in * those cases could not be supported, neither could it be in the present.

Postea to the Plaintiffs.

Wednesday,
July 9th.

DE BERDT *against* ATKINSON.

A. draws a promissory note payable to *B.* or order, which *B.* indorses, having given no value for it and knowing that *A.* is insolvent. In an action by the indorsee against *B.* it is not necessary to prove that the note was presented for payment to *A.* immediately when it became due, or that notice was given to *B.* of *A.*'s refusal to pay it (*a*).

THIS was an action by the indorsee of a promissory note made by one *Brown*, against the payee who indorsed it. The facts which appeared at the trial were, that the note was not presented to the maker till the day after it became due, that notice of his refusal to pay it was not given to the Defendant till five days after that refusal, but that the Defendant gave no value for it, and lent his name merely to give credit to the note, well knowing at the time it was drawn and indorsed, that *Brown* was insolvent. On this evidence under the direction of the Lord Chief Justice, a verdict was found for the Plaintiff.

A rule having been granted to shew cause why there should not be a new trial, *Adair*, Serjt., shewed cause. Under the circumstances of this case, no notice was necessary to be given to the Defendant, because no loss could happen to him from the want of it; and that is the principle upon which notice is in any case required. Thus if the drawer of a bill of exchange has no effects in the hands of the drawee, it is not necessary to give him notice of the bill being dishonoured, 1 *Term Rep. B. R.* 405, *Bickerdike v. Bollman*. 2 *Term Rep. B. R.* 713, *Rogers v. Stephens*. Now the maker of a promissory note stands in the place of the acceptor of a bill of exchange, and the indorser of a note in that of the drawer of a bill. The rules therefore which govern bills of exchange, are in this respect applicable to promissory notes. And indeed the case is much stronger where the drawer of a bill knows that the drawee is insolvent, than where the drawee has simply no effects of the drawer in his hands, because if he were not insolvent, he might possibly pay it for the honour of the drawer.

(*a*) [See *Smith v. Becket*, 13 East, 187. which appears to overrule the principal case. See also *Brown v. Maffey*, 15 East, 216. *Free v. Hau-*

kins, 8 Taunt. 92. *Nicholson v. Gouthet*, post. 609. *Corney v. Da Costa*, 1 Esp. N. P. C. 302.]

Here

Here the payee knew the maker to be insolvent, and as he lent his name merely to give credit to the note, he was a party to a fraudulent transaction.

Watson, Serjt., *contra*, argued, first, that notice ought to have been given to the Defendant, for which he cited 2 *Stra.* 1087, *Collins v. Butler*: secondly, that as the Plaintiff had not presented the note to the drawer in due time, he had given credit to him, and discharged the indorser; and thirdly, that as the Defendant received no benefit from the transaction, he ought not in justice to be charged with the payment of the note.

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Lord Chief Justice EYRE. It is clear that the money was to be raised on the note, entirely on the credit of *Atkinson*: *Brown* was known by all parties to be insolvent, and *Atkinson* to be in opulent circumstances; the merits therefore, as well as the strict law of the case, are against the Defendant. Admitting that there must be a demand of payment made on the drawer, here there was a demand. But it is objected that the demand was not made in due time. But consider on what ground an early demand is in general required. It is, because if any delay takes place, the effects may be gone out of the hands of the acceptor, and if the holder chooses to wait, he does it at his own risk. But apply this rule to the case of known insolvency: what does it signify to the person who is liable in the second stage, at what time the demand is made on the drawer, who was known to be insolvent from the beginning? (a) General rules are established for general convenience, and I agree, that if the drawer is not *known* to be insolvent, the fact of insolvency will not excuse the want of an early demand: but the fact of knowledge excludes all the presumptions that would otherwise arise. Then as to notice, and the application for payment to the Defendant, what did it signify to him, when that application was made? It could make no difference to him whether it were made on one day or another; he meant to guarantee the payment of the note, and there was no possibility of any loss happening to him from the want of notice. In this instance therefore, the general rule fails in its application.

(a) [In the present case the Defendant on payment of the note would have had a remedy for the amount against the maker, which appears to take the case out of the principle on

which *Bickerdike v. Bollman* was decided, and to render notice necessary. See *Cory v. Scott*, 3 B. & A. 623. and the observations in Bayl. on Bills, 248. 4 ed. *Leach v. Hewitt*, 4 Taunt. 733.]

BULLER, J.

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BULLER, J. The general rule has been long settled, but it is only applicable to the case of fair transactions, where the bill or note has been given for value in the ordinary course of trade. There were many early cases at *Guildhall* to that effect, and the same point was afterwards decided by Lord *Mansfield*. It is said that the insolvency of the drawer does not take away the necessity of notice; that is true where value has been given, but no further. Here it is plain that *Atkinson* lent his name, merely to give credit to the note, and was not an indorser in the common course of business. It is no answer to say that he received no benefit: he never meant to receive any. This case therefore may be decided, without breaking in upon any rules hitherto laid down, in cases of notes given for value.

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HEATH, J., of the same opinion.

ROOKE, J., of the same opinion.

Rule discharged.

Wednesday,
July 9th.

BENDELACK against MORIER.

A. a merchant in London draws a bill of exchange on B. at Pisa, payable to the order of C. a French merchant resident in France: C. indorses it to D. of Nice, and D. to E. of Leghorn. The bill not being paid when due, E. draws another bill for the amount of the former on A. in favour of F. of Leghorn, which is indorsed

to G. a merchant in London, in the course of trade, and accepted by A. The stat. 34 Geo. 3. c. 9. s. 4. prevents G. from maintaining any action on the latter bill against A.; and if such action be brought, the Court will stay the proceedings (a).

THE facts of this case were the following. The Plaintiff and Defendant being both resident merchants in London, on the 6th of August 1793, the Defendant drew two bills of exchange on *Grantonne* and Co. of *Pisa*, payable at *Leghorn* to the order of *Rycault* and Co. of *Marseilles*, for value received of *Ransom Morland* and Co. in London, and ordered for acceptance to *De Berte* of *Leghorn*: *Rycault* and Co. indorsed them at *Marseilles*, to the order of *Freres* and Co. of *Nice*, dating the indorsement according to the style adopted in France, 15 Pluviose 2 year of the French Republic, i. e. the 4th of February 1794, and *Freres* and Co. indorsed them to *Levy* of *Leghorn*. When the bills became due, they were not paid by *De Berte*, in consequence of which, on the 14th of March 1794, *Levy* drew a bill on the Defendant for the amount of them, payable at sight to *Aberdarham* of *Leghorn*, to be placed in balance for the return of those other bills, and by him indorsed to the Plaintiff, in the course of business. This bill on the 8th of April the Defendant specially accepted, if *De Berte* had

(a) [Vide *Mellish v. Simeon*, post. 378.]

not

not paid, or declined to pay the other two bills, upon those bills with protests being produced, and also *De Berte's* declaration (in answer to a letter of the Defendant's) that he had not, and would not pay those bills.

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When the latter bill became due, the Defendant refused to pay it, on account of the statute 34 Geo. 3. c. 9. (commonly called the *French Property Act*) having passed, the 4th section of which enacts, "That if any person residing or being in "*Great Britain*, shall after the *first day of March* 1794, knowingly and wilfully, in any manner pay or satisfy any bill of "exchange, note, draught, obligation, or order for money, in "part or in the whole, which since the first day of *January* "1794, has been, or at any time during the said war shall be "drawn or accepted, or *indorsed*, or in any manner negotiated in, "or in any manner sent from any part of the dominions of "France, or any country, territory, or place, which was on the "said first day of *January* 1794, or at any time during the "said war, and at the time of such act done, shall be under "the government of the persons exercising, or who shall here- "after exercise the powers of government in *France*, or drawn, "accepted, or *indorsed*, or in any manner negotiated by or for "the use of, or upon the credit of the effects of, the persons "exercising the powers of government in *France*, or of any "person or persons, who on the said first day of *January* "1794, were or was, or at any time since have or has been, or "who at the time of such act done, shall be in any of the "dominions of *France*, or in any such country, territory, or "place as aforesaid, every person so offending shall forfeit and "lose double the value of such bill of exchange, &c. &c. and "the payment of such bill of exchange, &c. shall not be effected "against any person or persons whatsoever, who might other- "wise have demanded the same, or the money thereby made "payable, &c."

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In consequence of the refusal by the Defendant to pay this bill, the present action was brought; and a rule having been granted to shew cause why the proceedings should not be staid, on the ground of the case being within the statute, *Adair and Le Blanc*, Serjts., shewed cause, contending that the only person who would be benefited by the special acceptance was *Bendelack*, and he being resident in this country was not within the act.

BULLER, J.

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BULLER, J. (a) The only question is, Whether this bill was not a mode of paying the former bills? Now there were two objects which the act had in view; one, that a *Frenchman* should not receive money, the other, that an *Englishman* should not pay it. But as the effect of the bill was to discharge the indorsement made at *Marseilles*, the case comes directly within the act.

ROOKE, J., of the same opinion.

Rule absolute.

(a) Absent the Lord Chief Justice and *Heath*, J.

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One of two makers of a joint and several promissory note having become a bankrupt, the payee receives a dividend under the commission, on account of the note: this will prevent the other maker from availing himself of the Statute of Limitations, in an action brought against him for the remainder of the money due on the note, the dividend having been received within six years before the action brought (a).

JACKSON *against* FAIRBANK.

THIS was an action on a joint and several promissory note made *July* 18th, 1784, by *James Fairbank* and *William Fairbank* his son, to the Plaintiff, for 100*l*.

In the same year *James Fairbank* became a bankrupt, and the Plaintiff received several dividends under the commission, in respect of the 100*l*. secured by the note in question, the last of which was paid in the course of the year 1793, and there remained due 58*l*. 6*s*. 8*d*. for which this action was brought. The Defendant pleaded *non assumpsit* and the Statute of Limitations, but a verdict was found for the Plaintiff, under the direction of Mr. Justice *Heath*, before whom the cause was tried. A rule being granted to shew cause why there should not be a new trial, the question was, Whether the payment of part of the money due on the note by the assignees took the case out of the Statute of Limitations?

Clayton, Serjt., who shewed cause, contended that the act of the assignees was the act of the bankrupt himself, and if the bankrupt had acknowledged, or paid part of the debt, the presumption raised by the length of time would have been repelled. It is decided in *Whitcomb v. Whiting*, Dougl. 651. that the acknowledgment of one of several drawers of a joint and several promissory note takes it out of the Statute of Limitations as against the others, and may be given in evidence, in a separate action against any of the others.

(a) [Vide *Brandram v. Wharton*, 1 B. & A. 468. *Atkins v. Tredgold*, 2 B. & C. 23. *Perham v. Raqual*, 2 Bingham. 511. 2 Saund. 64. (notis) 5th edit.]

Cockell,

Cockell, Serjt., on the other hand, insisted that as the bankrupt himself had done no act to acknowledge the debt, the case came within the Statute of Limitations, of which, the assignees of one of the drawers could not prevent the other from availing himself. But

The Court were clearly of opinion, that the payment of the dividend under the commission, was such an acknowledgment of the debt, as took the case out of the Statute of Limitations.

Rule discharged.

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COMER *against* BAKER.

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TO this action of trespass *quare clausum fregit*, with cattle, &c. there were several pleas:—1. The general issue. 2. Disclaimer of title, that the trespasses were involuntary and tender of amends. 3. A distress taken damage-feasant, for the same trespass. 4. That the cattle escaped on account of the fences being out of repair. 5. A licence. To all the special pleas, except that of the licence, there were new assignments, and to the new assignments similar pleas, and issues taken on them, on which a general verdict was found for the Plaintiff, with *five* shillings damages; but the judge did not certify.

Where in an action of trespass *quare clausum fregit*, a special plea is pleaded, and the issue found for the Plaintiff, he is intitled to full costs, though the damages are under 40s. and there is no certificate of the judge (a).

The prothonotary having taxed full costs to the Plaintiff, on the ground that wherever an issue on a special plea was found for the Plaintiff, he was intitled to full costs, though the damages were less than forty shillings, a rule was granted to shew cause why the taxation should not be reviewed. Against which *Runnington*, Serjt., now shewed cause, relying on the case of *Redridge v. Palmer*, *ante*, 2. as decisive of the point in question.

On the other side, *Le Blanc*, Serjt., said that this case was brought before the Court in order that the authority of *Redridge v. Palmer* might be reconsidered. In that case, the report of the prothonotaries as to the practice in the office, proceeded on a mistake, in not distinguishing between such pleas as might bring the title to the freehold in question, and such as could not. The statute 22 and 23 *Car. 2. c. 9.* is positive, that in all actions of trespass and assault and battery, wherein the judge at the trial of the cause shall not certify that an assault and battery was sufficiently proved, or that the freehold or title of

(a) [Vide *ante*, p. 2. note (a).]

the

1794. the land mentioned in the declaration, was chiefly in question, the Plaintiff, if the damages are under forty shillings, shall have no more costs than damages. It is true indeed, that where the plea is of such a kind, that it appears on the face of the record that the title to the freehold must come in question at the trial, there a certificate is holden to be unnecessary. But in the present case, the title to the freehold could not come in question (a) on any of the pleas pleaded; and it is not a mere special plea, that will entitle the Plaintiff to full costs, without a certificate. No such arbitrary rule was ever laid down, prior to the case of *Redridge v. Palmer*. In *Page v. Creed*, 3 *Term Rep. B. R.* 391. where in trespass for an assault and battery the Defendant justified the assault only, and the damages were under forty shillings, the Plaintiff had no more costs than damages. But if the justification in that case had extended to the battery as well as the assault, a certificate would not have been necessary to intitle the Plaintiff to full costs, because then the battery would have been admitted, and the requisite of the statute, that the battery should be *fully proved*, would have been complied with. That case therefore shews that a mere special plea found against the Defendant, will not intitle the Plaintiff to full costs, without a certificate; but that such a plea as will have that operation, must be in effect tantamount to a certificate. The same doctrine is also laid down in *Washer v. Smith*, 2 *Barnadist.* 180. 277. and in *Philpot v. Jones* there cited, and in *Dover v. Robinson*, *Barnes*, 128. To the same effect likewise is *Cockerill v. Allanson*, *Trin.* 22. *Geo. 3.* in *B. R.* (b).

The Court said (c), that if this had been a new case, they should have thought that the construction of the statute 22 and 23 *Car. 2. c. 9.* contended for on the part of the Defendant, ought to be adopted. But that as a different practice had long prevailed, and as that practice was confirmed by the case of *Redridge v. Palmer*, which was decided upon great consideration, they did not think it right to depart from it.

Rule discharged.

(a) There was an express disclaimer of title on the record; it should seem therefore that a certificate that the title came chiefly in question, could not have been granted. If so, the statute 22 and 23 *Car. 2. c. 9.* appears, independent of adjudged cases, to be decisive.

(b) *Bull. N. P.* last edit. 330. *Hullock's Law of Costs*, 86. *Tidd's Law of Costs*, 82. and vol. II. of the excellent *Treatise of the Practice of the Court of King's Bench*, by the same author, p. 653. [1001. 8th edit.]

(c) Absent Mr. Justice *Buller*.

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A policy of insurance is effected on certain goods on board a certain ship on a voyage, at and from A. to B., and another policy is also made on any kind of goods as interest should appear on board ship or ships, on the same voyage, warranted to sail within a limited time, but no circumstances relating to the first policy are communicated

KEWLEY and Another against RYAN.

THIS was an action on a policy of insurance, and the material facts of the case were as follow:—On the 24th of May 1793, *Freeland* and *Rigby*, merchants at *St. Vincents*, wrote (a) to the Plaintiffs, merchants at *Liverpool*, who were also partners in a house of the same name at *Grenada*, requesting them to get 1260*l.* insured on 70 bales of cotton shipped on board the *Elizabeth*, from *Grenada* to *England*, and also 1300*l.* on another cargo of cotton and other goods, which they intended to ship on board some other ship that should sail with the first convoy, and therefore directing the latter insurance to be on ship or ships. The Plaintiffs accordingly by their broker insured 1260*l.* on board the *Elizabeth* in *London*, and 1300*l.* on board ship or ships, viz. 700*l.* at *Liverpool*, and 600*l.* in *London*. The policy for 700*l.* of which the Defendant underwrote 50*l.*, and on which the action was brought, was at and from *Grenada* to *Liverpool*, on any kind of goods as interest should appear, in ship or ships on account of *Freeland* and *Rigby*, warranted to sail on or before the 1st of *August* 1793, and to return 3 per cent. if the

to the underwriters of the second, nor do they know that the first was made. Goods to the full amount of the sum insured in the first policy are put on board the specified ship, which arrives in safety. Goods also to the full amount of the sum insured in the second policy are put on board another ship, which sails within the time limited from A. with an intention to touch at C. in her course to B., but is lost before she arrives at the deviating point (b). The underwriters of the second policy are answerable for the loss.

(a) The following was the letter:—

“ 24th May 1793.

“ Messrs. *John* and *Patrick Kewley*.

“ Dear Sir,

“ By a letter received this morning from your Mr. *Wm. Kewley*, I find he has shipped on board your *Elizabeth* 70 bales of cotton belonging to your house, and addressed it to you, on which I request you will get insured twelve hundred and sixty pounds sterling, valuing it at 18*l.* per bale.

“ I am, &c.

“ *Thomas Rigby*.”

“ P.S. Upon considering our affairs I have determined to return our boat immediately to *Grenada* with another load of cotton, and have it shipped to your address by some vessel that will sail with the first convoy, therefore be pleased to make insurance for 1300*l.* sterling on our accounts by ship or ships at 18*l.* per bale at and from *Grenada* to *England*. The Government sloop is just arrived from the fleet, and brings account that the convoy will be appointed to sail the first week in *June*.”

(b) [Vide *Middlewood v. Blakes*, 7 & S. 46. *Tasker v. Cunninghame*, 1 T. R. 162. *Heselton v. Allnut*, 1 M. Bligh, 87.]

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ship sailed with convoy bound to *Great Britain*, and arrived, &c. without any exception of the goods on board the *Elizabeth*. The policy for 600*l.* effected in *London*, was also *on ship or ships* at and from *Grenada* to *Liverpool*, but with an exception to 1260*l.* “on 70 bales of cotton per *Elizabeth Crettin*”, the same underwriters in *London* having before subscribed the policy on the *Elizabeth*. But the Plaintiffs did not communicate to the underwriters at *Liverpool*, the letter of *Freeland* and *Rigby* directing an insurance on the *Elizabeth*, nor any circumstance respecting the goods shipped on board the *Elizabeth*, and the insurance made on that ship.

The *Elizabeth* sailed early in *June*, and arrived safe at *Liverpool*, in *August*, 1793. The *Heart of Oak* (a), on board of which *Freeland* and *Rigby* had shipped their second cargo of cotton, &c. sailed the latter end of *July*, bound for *Liverpool*, but with a design formed before the commencement of the voyage (as appeared by the clearances, and was admitted on all sides) to touch at *Cork* in her way to *Liverpool*, but was totally lost before she arrived at the deviating point.

The Defendant pleaded the general issue, and a tender of 1*l.* 10*s.* on account of the safe arrival of the *Elizabeth*, which the Plaintiff took out of court, and obtained a verdict for 48*l.* 10*s.*

A rule having been granted to shew cause why there should not be a new trial, *Adair* and *Heywood*, Serjts., shewed cause.

Considerable doubts having been thrown out at the trial, whether such a policy as this on ship or ships were a good one, the validity of it is first to be considered. Now policies of this kind are well known to foreign nations, *Emerigon*, 173. tit. Assurance in quovis, and are constantly used in the *West India* trade by us in time of war, when it is uncertain by what ships the produce of the different islands may be sent to *Europe*; and they are also supported by authorities, *Tierney v. Etherington*, cited 1 *Burr.* 349. 2 *Stra.* 1248. *Dick v. Barrel*, and *Parke*, 19. There are, therefore, only two questions; 1. Whether the policy on ship or ships was discharged by the safe arrival of the *Elizabeth*, or in other words, whether the insured had a right to apply the insurance to the *Heart of Oak* that was lost? 2. Whether the voyage insured being from

(a) It did not appear that the Plaintiffs when they effected the insurance in question, knew on board

what ship *Freeland* and *Rigby* had shipped this cargo.

Grenada

Grenada to Liverpool, the policy was rendered void by an intention to touch at *Cork* in the way to *Liverpool*, the ultimate port of delivery, that intention not having been carried into effect? 1. The Plaintiffs had clearly a right to apply the insurance to the ship that was lost. The insurances were totally distinct, and so were the risks, and the one is in no degree applicable to the other. If the *Elizabeth* had been lost, the Defendant would clearly not have been liable, there being a separate insurance on that ship, but the benefit and loss must be reciprocal, and if he would not have been answerable in case of the loss, he cannot be benefited by the safety of the *Elizabeth*.

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[Mr. Justice *Buller*, in this part of the argument, cited the case of *Henchman v. Offley (a)*, in confirmation of the doctrine that

(a) *Henchman v. Offley*, B. R. Mic. 23 Geo. 3.

This was an action on a policy of insurance of 6000*l.* on goods, to come in ship or ships from *Bengal* to *London*; and the facts of the case were the following: the Plaintiff in *India* wrote to his correspondent in *England*, to get two insurances, one of 6000*l.* on goods on board any ship or ships which should sail between the first of *November*, 1779, and the first of *July*, 1780, and the other of 4000*l.* on goods on board any ship or ships, which should sail between the first of *February* and the thirty-first of *December*, 1780. The two insurances were accordingly effected, and the Plaintiff loaded goods to the amount of 4889*l.* on board the ship, *General Barker*, and 4500*l.* on board the ship, *Ganges*, and at the time of the loading entered a certificate before Sir *Elijah Impey*, the Chief Justice, that he had put such goods on board the one ship, and such on board the other, and that he had shipped on board the *General Barker* 4889*l.* of the risk intended to be covered by the 6000*l.* policy. Both ships sailed within the time mentioned in the first policy; the *General Barker* was lost, but the *Ganges* arrived safe at the place of her destination; and this action was brought on the policy for 6000*l.* which the Plaintiff contended he had a right to apply to the *General Barker*, and went for a total loss. At the trial, two objections were made: 1st. that evidence could not be given of what passed in the *East Indies*: 2d. that there ought to be a contribution, all the underwriters called upon as for an average loss, and both policies taken into the account, and that the Plaintiff ought only to recover in the proportion of 4889*l.* to 4500*l.* or at most as 4889*l.* was to 1111*l.*

Lord *Mansfield* over-ruled the objection as to the evidence, and was of opinion, that the Plaintiff might apply the 6000*l.* policy entirely to the *General Barker*; and a verdict was found accordingly. But a new trial was moved for, and a rule granted to shew cause.

In support of the rule, *Lee*, *Cowper*, and *Pigot* contended, that all the underwriters were liable for losses on both ships; that if the *Ganges* had been lost, the Defendant would have been called upon, and therefore, that as

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that the insured had a right to appropriate: and also intimated a decided opinion, that the mere intention to put it into *Cork* in the course of the voyage to *Liverpool*, did not vitiate the policy.]

But supposing the *Elizabeth* to be one of the ships on which the policy in question might attach, still the Plaintiff is intitled to keep his verdict, for he had a right to appropriate; and then the different insurances might be brought into average. 1 *Emerigon*, 174. There is nothing in the law of *England* which says, that the first arrival shall discharge the underwriter. 2. The policy was not avoided by a simple intention to touch at *Cork*, in the course of the voyage to *Liverpool*, which was the port of delivery. The ship originally sailed on the voyage insured, and an intention to deviate not carried into effect, does not vitiate the policy. *Foster v. Wilmer*, 2 *Stra.* 1249. *Carter v. The Exchange Assurance Company*, *ibid.* *Thelusson v. Ferguson*, *Dougl.* 361. It is true, that in *Wooldridge v. Boydell*, *Dougl.* 6. the policy was holden to be void, but that case was essentially

he would have in that case been liable for the loss, he was in justice intitled to the benefit of salvage. There was no appropriation of any particular ship or goods, and this is an attempt to appropriate after a loss. At the time when the policy was underwritten, it was not communicated to the underwriters, that so much was shipped on board the *General Barker*, and so much on board the *Ganges*, and they shall not be affected by a declaration afterwards made without their privity. The contract must be explained according to the situation in which things stood between the parties, at the time when it was made. The Plaintiff shipped 4889*l.* on board the *General Barker*, and 1100*l.* on board the *Ganges*, and this at a time when he did not know that the premiums and expence of insurance would make up the exact sum of 6000*l.*

Wallace, *contra*. The material question is, whether the 4500*l.* on board the *Ganges*, shall be taken into the account of the loss of the *General Barker*. The owner in *India* meaning to ship 6000*l.* property, sends to insure it. The meaning of this policy is, that he may load goods to that amount, on board any ship or ships. As he had not the policies, he could not make any indorsement on them, but he not only writes to his correspondent here, but makes a solemn oath before the chief magistrate in *India*, of the manner in which he shipped the goods, and of the apportionment. Suppose he had said he put all, covered by the 6000*l.* policy, on board the *General Barker*, the underwriter could not have objected. This was an appropriation made before any loss had happened, or the ships had sailed, which the insured had clearly a right to make.

The Court discharged the rule, but ordered the salvage on the 1111*l.* to be deducted out of the damages recovered, which made a deduction of about one-fifth.

different

different from the present; there the voyage insured was “at and from *Maryland* to *Cadiz*,” but the ship was in fact bound to *Falmouth*, and there was no intention of going to *Cadiz* at all; here *Liverpool* was the place of final destination, to which the ship would have really proceeded. The true criterion to determine whether a voyage on which a ship sets out is the same as that insured, is to discover whether she is in fact bound to her ostensible port of delivery; if that be the case, an intention to go out of the track, not carried into execution, does not alter the nature of the voyage.

Le Blanc, Serjt., *contra*. The ground on which it is to be contended that the policy was satisfied, is, that a ship answering the description in it arrived in safety, having the full amount of the sum insured on board. Every circumstance respecting the specific insurance on the *Elizabeth* having been concealed from the Defendant, it was the same with regard to him, as if no such insurance had been made on that ship. If, therefore, the *Elizabeth* had been lost, and the *Heart of Oak* had arrived in safety, the Plaintiffs had it in their power, by suppressing the letter of the 24th of *May*, to have charged the Defendant on that loss. In common justice, therefore, the underwriter ought to be benefited by the safety of the same ship, for the loss of which, if it had happened, he would have been liable to pay. The Plaintiff, too, by concealing the particular insurance on the *Elizabeth*, acted without the good faith required in mercantile transactions, and contrary to the directions expressed in the ordinances of other nations, for the purpose of preventing frauds, *Weskett*, 520. They shall not, therefore, be permitted to avail themselves of their own wrong.

As to the case of *Tierney v. Etherington*, that was not a case of a general insurance, for it was specified in the policy, that the goods were to be on board a *British* ship or ships: so in *Dick v. Barrett*, the insurance was equally certain, being on any ship in which the Plaintiff should come from *Virginia* to *London*, which was the same in effect as if the ship itself had been specified. Those cases, therefore, are not applicable to that of a general insurance like the present. The only case where the policy was similar, is, *Henchman v. Offley*, and there it does not appear that the validity of the policy came in question: there also the appropriation was not made till after the insurance, but here it was made before.

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The next question is, whether the voyage insured was not a different one from that on which the ship set out; for though a mere intention to deviate, not carried into effect, will not vitiate the policy provided the voyage be the same, yet if the voyage be different, the policy is clearly void, according to the doctrine laid down in *Wooldridge v. Boydell*, Dougl. 6. and *Way v. Modigliani*, 2 Term Rep. B. R. 30. Now it cannot be fairly said, that a voyage from *Grenada* to *Liverpool*, and from *Grenada* to *Cork* and *Liverpool*, are one and the same. So clear indeed was Lord *Kenyon* on this point, that at *Guildhall* (a) the Plaintiff was nonsuited in an action on a policy of insurance on this very ship the *Heart of Oak*, on the ground that it was not the voyage insured, and that there had been no inception of that voyage.

Cur. advis. vult.

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On this day, the Court, consisting of the Lord Chief Justice (b), Mr. J. *Heath*, Mr. J. *Rooke*, declared their opinion as to the first point which had been made in the argument, that the legality of the policy on ship or ships was too well established both by usage and authority to be disputed; as to the second, that the insured had clearly a right to apply such an insurance to whatever ship he thought proper within the terms of it, for which the case of *Henchman v. Offley* was an authority; as to the third, that where the *termini* of the intended voyage were really the same as those described in the policy, it was to be considered as the same voyage, and a design to deviate, not effected, would not vitiate the policy. That in *Wooldridge v. Boydell* it appeared there was no intention that the ship should go to *Cadiz* at all, which was mentioned in the policy as her port of delivery, and in *Way v. Modigliani* there was an actual deviation by the ship going to fish on the banks of *Newfoundland*; those cases therefore were wholly different from the present, for here the ship was really bound to *Liverpool*, though there were also clearances for *Cork*. The remaining question therefore was, whether the letter of the 24th of *May*, by which *Freeland* and *Rigby* directed an insurance to be made on the *Elizabeth*, and the actual circumstances of that insurance ought to have been communicated to the under-

(a) *Stott v. Vaughan*, sittings after Hilary term, 34 Geo. 3.

(b) Mr. Justice *Buller* was absent,

but it was stated by the Lord Chief Justice that he fully concurred with the rest of the Court.

writers

writers on the present policy? But as nothing was necessary to be disclosed but what was material to the risk run, and as the insurance on the *Elizabeth* was not material to that risk, the concealment was not fraudulent, and therefore could not affect the right of the Plaintiffs to recover.

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Rule discharged.

END OF TRINITY TERM.

CASES

C A S E S

ARGUED AND DETERMINED

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IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER CHAMBER,

IN

Michaelmas Term,

In the Thirty-fifth Year of the Reign of GEORGE III.

CORNISH *against* ROSS.

Saturday,
Nov. 15th.

IT was objected to a person who was going to justify himself as bail, that he was a clerk to an attorney though not articulated. It was contended, on the other hand, that the rule prohibiting attornies from being bail, had never yet been extended beyond their *articled* clerks. But on Mr. J. Buller's observing, that in the King's Bench the rule comprehended clerks who were not articulated, as well as those who were, the

A clerk to an attorney, though *not articulated*, cannot be bail to the action (a).

Bail was rejected.

(u) [Vide *ante*, vol. I. p. 76. n. (a).]

PAYNE *against* ROGERS.

Saturday,
Nov. 15th.

LE BLANC, Serjt., moved for a rule to shew cause why the verdict found for the Plaintiff in this cause should not be set aside, and a nonsuit entered. It was an action on the case *occupier*, is liable to an action on the case for an injury sustained by a stranger from the want of repair (a).

If the *owner* of a house is bound to repair it, he, and *not the*

(a) [Vide *Leslie v. Pounds*, 4 Taunt. 404. *Coupland v. Hardingham*, 3 649. *Bush v. Steinman*, 1 Bos. & Pul. Campb. N. P. C. 398.]

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against the Defendant as owner of a house in the occupation of one *Platt* his tenant, for an injury sustained by the Plaintiff by his leg slipping through a hole in the foot pavement, into a vault or cellar, owing to some plates or bars, which went under the pavement, being out of repair. And the ground of the motion was, that the action ought to have been brought against the actual occupier of the house, whose more immediate business it was to know what repairs were necessary, and to see that they were made, and not against the landlord. Though the landlord might bear the expence of the repairs, yet, as between the occupier and the public, the occupier was bound to look to the state of them, and ought to be liable for any accident that might happen by his neglect. Thus in *Cheetham v. Hampson*, 4 Term Rep. B. R. 318. it was holden that an action on the case for not repairing fences could only be maintained against the occupier.

BULLER, J. Who was to repair in the first instance?

Lord Ch. J. Evidence was given of repairs being actually done by the landlord. And I thought at the trial, that though the tenant was *primâ facie* bound to repair, and therefore liable, yet if he could shew that the landlord was to repair, then that the landlord was liable.

BULLER, J. The direction of my Lord Chief Justice was most clearly right. I agree that the tenant as occupier is *primâ facie* liable to the public, whatever private agreement there may be between him and the landlord. But if he can shew that the landlord is to repair, the landlord is liable for neglect to repair.

HEATH, J. If we were to hold that the tenant was liable in this case, we should encourage circuitry of action, as the tenant would have his remedy over against the landlord.

ROOKE, J., of the same opinion.

Rule refused.

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Wednesday,
Nov. 26th.BARNEY *against* TUBB.

TO this action for goods sold and delivered, the Defendant pleaded, that at the time of commencing the action he “was not indebted to the said *Nathaniel* (the Plaintiff) in any “*sum or sums of money amounting to the sum of *forty* shillings, “and that at the time of commencing such action, he the said “*John* (the Defendant) was inhabitant and resiant within the “parish of *Saint Mary Magdalen Bermondsey, in the county of* “*Surrey, and liable to be warned and summoned for such debt* “*before the Court of Requests mentioned in a certain Act of Par-* “*liament, made at Westminster in the county of Middlesex, in* “*the twenty-second year of the reign of his late Majesty King* “*George the Second, intituled An Act for the more Easy and* “*Speedy Recovery of Small Debts within the Town and Borough* “*of Southwark, and the several Parishes of Saint Saviour, Saint* “*Mary at Newington, Saint Mary Magdalen Bermondsey,* “*Christ Church, Saint Mary Lambeth, and Saint Mary Ro-* “*therhithe in the county of Surrey, and the several Precincts and* “*Liberties of the same.*”

To this plea there was a general demurrer, which on this day was thus argued by *Marshall*, Serjt.:—

The ground of this demurrer is, that though the matter of the plea, if used by way of suggestion on the record after verdict, would have been good to deprive the Plaintiff of costs, and to give them to the Defendant, yet it cannot be pleaded as a bar to the action. To have enabled the Defendant to plead this plea, the act should have given an exclusive jurisdiction to the Court of Requests, by taking away the jurisdiction of all

The South-
wark Court
of Requests
Act 22 Geo.
3. c. 47.
cannot be
pleaded to
an action
brought in
a superior
Court. The
proper mode
for the De-
fendant to
avail himself
of it, is by
entering a
suggestion
on the re-
cord, after
verdict, or
the execu-
tion of a writ
of inquiry.
Where the
Plaintiff
having ob-
tained judg-
ment on a
general de-
murrer to
such a plea,
executed a
writ of in-
quiry, on
which the
damages
were assess-
ed at less
than 40s.
five days be-
fore the end
of the term,
and signed

final judgment on the last day of the term, the Court in the next term, refused to direct the prothonotary to review his taxation of costs to the Plaintiff, on an affidavit stating the former proceedings, and that the Defendant was *resiant* within the jurisdiction of the inferior court: because the Defendant ought to have entered a suggestion, and that before final judgment was signed (a). And to intitle himself to such a suggestion, supposing it to be moved for in time, the Defendant must state in the affidavit, not only that he is *resiant* within the jurisdiction of, but also that he is *liable to be warned or summoned to the Court of Requests* (b). After judgment by default the Defendant is *still in court*, for many purposes, one of which is that of entering such suggestion (c). *Semb.* that judgment on a general demurrer to a plea in bar, the matter of which, even if well pleaded, would be no defence to the action, is to be considered as a judgment by default.

(a) [Accord. *Calvert v. Everard*, 5 M. & S. 510. See also *Hippesley v. Layng*, 4 B. & C. 863.]

(b) [*Tucker v. Crosby*, 2 Taunt. 169.]

(c) [Vide *Harris v. Lloyd*, 4 M. & S. 171. 1 Chitty's Rep. 636 (n.) Tidd's Pr. 996. 8th edit.]

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other courts in matters of this sort. This is done by the *Westminster* Act, 23 *Geo.* 2. c. 27. s. 21. which provides, that “no action for any debt under forty shillings, and recoverable in the Court of Requests, shall be brought against any person within the jurisdiction thereof in any other court whatsoever.” This prohibitory clause is a bar to every action brought out of the Court of Requests, of which that court has jurisdiction; and the eighth section gives a short form of the plea and replication, to prevent special pleading. The *Tower Hamlets* Act, 23 *Geo.* 2. c. 50. s. 21. has the same prohibitory clause, and though it gives no form of plea, yet it may be pleaded, or the facts which bring a case within it may be given in evidence under the general issue, and the judge would be bound to nonsuit the Plaintiff. The *Southwark* Act, 22 *Geo.* 2. c. 47. on which this plea is founded, has no prohibitory clause, but it leaves the jurisdiction of other courts as it stood before. That act, s. 6. provides, “that if in any action of debt or action on the case, upon an assumpsit for recovery of any debt to be sued or prosecuted against any person or persons aforesaid, in any of the King’s Courts at *Westminster* or elsewhere, out of the said Court of Requests, it shall appear to the judge or judges of the court where such action shall be sued or prosecuted, that the debt to be recovered by the Plaintiff in such action doth not amount to the sum of forty shillings, and the Defendant in such action shall duly prove by sufficient testimony, to be allowed by any judge or judges of the said court where such action shall depend, that at the time of commencing such action, such Defendant was inhabiting and resiant within the said town and borough of *Southwark*, or any of the parishes, limits and precincts aforesaid, in the county of *Surrey*, and was liable to be warned or summoned before the said Court of Requests for such debt; then, and in such case the said judge or judges shall not allow to the said Plaintiff any costs of suit, but shall award that the said Plaintiff shall pay so much ordinary costs to the party Defendant, as such Defendant shall justly prove before the said judge or judges it hath truly cost him in the defence of the said suit.” This clause points out the mode of laying the facts before the Court, in order to obtain leave to enter a suggestion on the record, which must be after verdict, for the Court has no other means of ascertaining that the Plaintiff’s demand is under forty shillings, than

than by a verdict. And upon the *London Act*, 3 Jac. 1. c. 15. it has been determined in *Pennel v. Wallis*, cited 1 *Stra.* 46. that a suggestion after verdict was the proper mode of proceeding, and not a plea; and this appears in 2 *Stra.* 1120. 1191. *Dougl.* 244. to be the constant practice. If a suggestion be the proper mode of proceeding upon the *London Act*, it must be so upon the *Southwark Act*, because the sixth section of the latter, which directs the mode of proceeding, is copied from the fourth section of the former act. And where there is a particular mode of proceeding prescribed by a statute, the Court will oblige the party to follow that mode, and will not permit him to pursue any other. This was settled in *Taylor v. Blair*, 3 *Term Rep. B. R.* 452.: therefore a suggestion after verdict is the only mode of proceeding, by which the Defendant can avail himself of the benefit of the *Southwark Act*. If the Defendant were to prevail on this plea, the Plaintiff must lose his debt altogether, because the judgment would be a bar to any other action for it. But the *Westminster Act*, s. 9. provides, that where the Defendant shall avail himself of his plea, the Plaintiff may afterwards sue for his debt in the Court of Requests. Now there is no such provision in the *Southwark Act*, which is another decisive reason to shew that it cannot be pleaded. The Court, consisting of *Buller*, *Heath* and *Rooke*, Justices, in the absence of the Chief Justice, were so clearly of this opinion, that *Runnington*, Serjt., on the other side gave up the argument, and there was

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Judgment for the Plaintiff.

The Plaintiff having thus obtained Judgment, on the 5th of *July* in *Trinity Term*, executed his writ of inquiry, the damages being assessed at 1*l.* 1*s.* 3*d.* and entered up final judgment on the 9th, the last day of that term. On the fourth day of this term, *Runnington*, Serjt., obtained a rule to shew cause why the prothonotary should not review his taxation of costs, and why the proceedings on the judgment should not be staid, upon an affidavit which set forth the proceedings as above stated, and added, that the Defendant, at the time of the commencement of the action, resided within the jurisdiction of the *Southwark Court of Requests*. *Marshall*, Serjt., shewed cause against the rule, and contended, first, that this application was not in the proper and usual form; for the prothonotary could only

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only tax costs to the party who appears on the face of the record to be entitled to them; but if he were, in compliance with this rule, to review his taxation, and tax the costs for the Defendant, instead of the Plaintiff, the judgment would not be warranted by the previous proceedings on the record, and would therefore be erroneous. The proper application in such cases is for leave to enter a suggestion on the roll, to which the Plaintiff may demur, if it do not set forth the facts which bring the case within the act of parliament, or he may traverse those facts if they be untrue. With such a suggestion properly entered, the prothonotary would have an authority to tax the costs for the Defendant, and the judgment would be consistent with the rest of the proceedings. Secondly, if the proper application were made in this case, it would be now too late: the writ of inquiry was executed on the 5th of *July*; the term did not end till the 9th, on which day final judgment was signed, and if the Defendant had any reason to allege why the Plaintiff should not have had judgment in the ordinary course, he ought to have applied to the Court in the interval between the execution of the writ of inquiry and that day. Having neglected to do that, he has lost his opportunity, for the Court cannot alter or reverse a judgment regularly given in a former term. Thirdly, this was a judgment by default, and therefore the Defendant could not avail himself of the act, even if the application were right, and made in proper time. That it was to be considered as a judgment by default, appears from 1 *Salk.* 173. *Staple v. Haydon*, where it is laid down, that if a Defendant pleads an ill plea, but the matter if well pleaded would amount to a good bar, judgment cannot be given against him by confession; but where, as in this case, the matter, though well pleaded would signify nothing, the judgment may be given as by confession: and where he has suffered judgment by default, he is out of Court for every purpose except that of having final judgment against him, 1 *Salk.* 216. *S. C.* and *Stra.* 46. *Brampton v. Crabb*, and therefore he cannot now be received to make the suggestion. Fourthly, supposing the application to be regular in other respects, the affidavit is defective in not stating that the Defendant was liable to be warned or summoned to attend the Court of Requests for *Southwark*. For any thing that appears, he may be exempt from the jurisdiction of that Court, in the same manner

as attornies are, whose privilege exempts them from the jurisdiction of the Courts of Conscience, except in *Westminster*, where they are made liable by an express act of parliament.

In support of the rule, *Runnington*, Serjt., contended, that the act did not prescribe any particular term, nor any form in which the application should be made. The sixth section provides, that if the facts necessary to bring the case within the act, shall be proved by sufficient testimony, to be allowed by the judge or judges of the Court, the Defendant, and not the Plaintiff, shall have his costs. Those facts sufficiently appeared in the affidavit, and in the plea, which was confessed by the demurrer, so as to entitle the Defendant to the benefit of the act. The case in *Strange* has never been considered as law, since there can be no good reason why the Defendant, after judgment by default, should not have the benefit of the act, as well as after a plea of *non assumpsit*, and a verdict for the Plaintiff.

BULLER, J. (a) Upon the two first points I am of opinion with my Brother *Marshall*. I think it clear, for the reasons he has given, that an application for leave to enter a suggestion on the record, is the proper mode of proceeding. Without such a suggestion, the judgment would not be warranted by the premises. I think also, that the application ought to have been made to the Court, before judgment was finally given, and therefore that it should have been made in the last term: and I hold that even if the writ of inquiry be executed on the last day of the term, the Plaintiff has a right to sign his judgment as of that term. But here the Defendant had from the 5th to the 9th of *July* to apply to the Court, and having neglected so to do, he is now too late. Upon the third point I am not so clear. Taking this to be a judgment by confession, I do not agree that the Defendant is thereby out of Court, for every purpose but that of having final judgment against him. It is not now necessary to give any opinion on the case in *Strange*. If it were, I think we ought to consider it well before we agreed to establish the point there determined. I conceive that a Defendant, after judgment by default, may be deemed to be in Court for many purposes besides that of having final judgment against him. Some years ago it was holden on the authority of the case in *Strange*, that if the

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(a) Absent Lord Chief Justice.

Plaintiff

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against
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Plaintiff were nonsuited, he was out of court for all purposes but that of having judgment signed against him: and I remember the first instance in which that idea was over-ruled. It was done on a motion made by Mr. *Morton*, and since that time it has been the constant and settled practice of *Westminster Hall* to set aside nonsuits where the justice of the case required it. But upon the fourth ground, I agree with my Brother *Marshall*, that the affidavit ought to contain all the facts necessary to bring the case within the act, for if we are to grant leave to enter the suggestion, it must be upon such a state of facts as will warrant us in so doing. Here a material allegation is wanting, namely, that the Defendant was liable to be warned, which would alone have been a sufficient objection to this application, even if it had been right in all other respects.

HEATH, J., of the same opinion.

ROOKE, J., of the same opinion.

Rule discharged.

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Wednesday,
Nov. 26th.

WHITE, One, &c. against MILNER.

An attorney is not liable to pay the costs of taxing his bill, under the stat. 2 Geo. 3. c. 23. s. 23, where the deduction of one sixth is occasioned, not by the particular *items* being taxed, but by a whole branch of it being disallowed.

ON the motion of *Le Blanc*, Serjt., a rule was granted to shew cause why the Plaintiff, who was an attorney, should not pay the costs of the taxation of his bill by the prothonotary, according to the stat. 2 Geo. 2. c. 23. s. 23, under the following circumstances. The bill had been referred to the prothonotary by a judge's order, and on the taxation more than one sixth part was taken off. But the deduction was caused, not from any over-charges of particular *items*, but from the whole of the expences of defending two actions for one *Brandon* being disallowed; which it was stated that the Defendant had undertaken to pay to the Plaintiff, but which the prothonotary on reading the affidavits on both sides was of opinion that he had not undertaken to do. On an application last term to the Court for the prothonotary to review his taxation, they were of opinion that he had done right, and refused that rule. And now they held that the statute of Geo. 2. was applicable only where an attorney made exorbitant charges on his client in the particulars of his bill, and the foundation of the demand was not denied, but only the amount of it. In the present case,
the

the Plaintiff's charges for defending *Brandon* were not objectionable, provided he could have proved that the Defendant was liable to pay them, and the other *items* of the bill were not reduced one sixth.

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Rule discharged.

PROCTOR *against* The Bishop of BATH and WELLS,
THOMAS MOORE an Infant, and RICHARD GOLDS-
BOROUGH and EDWARD MOORE, his Guardians.

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IN this *quare impedit*, brought to recover the presentation to the church of the rectory of *West Coker* in *Somersetshire*, the declaration stated, that one *William Ruddock* was seised in fee of the advowson, and presented, that on his death it descended to his two nieces *Jane* and *Mary Hall*, that *Jane Hall* intermarried with *Nathaniel Webb*, and *Mary* with *Thomas Proctor*: that *Nathaniel Webb* died, his wife surviving him, whereby the said *Jane* in her own right, and *Thomas Proctor* and *Mary* in her right were seised, that the church then became vacant by the death of the incumbent, whereby the said *Jane Webb* and *Thomas Proctor* in right of the said *Mary*, presented their clerk; that *Jane Webb* died, upon whose death her whole share of the advowson descended to her son *Nathaniel Webb*, who thereupon became seised in fee in coparcenary, with *Thomas Proctor* and *Mary* his wife; that *Thomas Proctor* died, his wife surviving him, whereby the said *Nathaniel Webb* the son and *Mary Proctor* became seised. There were then set forth several presentations on vacancies by *Nathaniel Webb* and *Mary Proctor*. The death of the said *Nathaniel Webb* was then stated, whose share descended to his son *Nathaniel Webb*, who became seised in coparcenary with *Mary Proctor*. That *Mary Proctor* died, upon whose death her share descended to her grandson *Thomas Proctor*, who became seised together with the last mentioned *Nathaniel Webb*. That the church again became vacant, upon which they not agreeing upon any person to be presented by them jointly, the said *Nathaniel Webb* presented the said *Thomas Proctor*, as in the first turn of the said *Jane Webb*, the elder sister of the said *Mary Proctor*; that

A. devises an advowson to the first or other son of *B.* that should be bred a clergyman, and be in holy orders, in fee, but in case *B.* should have no such son, then to *C.* in fee. Both devises are void, as depending on too remote a contingency; therefore though *B.* dies without having had a son, the heir at law of the devisor, and not *C.* is intitled (a).

(a) [Vide *Cambridge v. Rous*, 8 Mr. Butler's note. *Fearne, Cont.*
Ves. 12. 24. *Beard v. Wescott*, 5 *Rem.* 508(k).]
Tamnt. 412. 5 B. & A. 801, and see

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PROCTOR
against
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he died, and his share descended to *Elizabeth Proctor* his sister, the present Plaintiff, who was intitled to present in the first turn of the said *Mary Proctor*, the younger sister of the said *Jane Webb*, yet, &c.

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The bishop pleaded the usual plea as ordinary; and the other Defendants, “ that true it was that the said *Nathaniel Webb* the grandson of *Jane Webb* and the said *Mary Proctor* were seised of the advowson in coparcenary, and that *Mary Proctor* died so seised, and that the said *Nathaniel Webb* presented as in the first turn of the said *Jane Webb*, &c. But the said Defendants further said, that the said *Mary Proctor* being so seised, made her last will and testament, and gave and devised unto the first or other son of her grandson, the said last mentioned *Thomas Proctor*, that should be bred a clergyman and be in holy orders, and to his heirs and assigns, all her right of presentation to the said rectory, &c. But in case her said grandson the said last mentioned *Thomas Proctor* should have no such son, then she gave and devised the said right of presentation unto her grandson the said *Thomas Moore*, his heirs and assigns for ever. That afterwards the said *Mary Proctor* died so seised, leaving the said last mentioned *Thomas Proctor* and *Thomas Moore* her surviving, and that afterwards the said *Thomas Proctor* died without having ever had any son; whereby and by virtue of the said last will and testament of the said *Mary Proctor*, the said *Thomas Moore* became seised of all the share of the said *Mary Proctor* of and in the said advowson, &c. wherefore it belonged to the said *Thomas Moore* to present, &c. as in the first turn of the said *Mary Proctor* the younger sister of the said *Jane Webb*, &c.

To this plea there was a general demurrer, which was twice argued; the first time by *Bond*, Serjt., for the Plaintiff, and *Hcywood*, Serjt., for the Defendants, and a second time, by *Adair*, Serjt., for the Plaintiff, and *Le Blanc*, Serjt., for the Defendants. The substance of the arguments on the part of the Plaintiff was as follows.

The question in this case is, whether the devise to *Thomas Moore* can take effect as an executory devise, since it is clear that it cannot create a contingent remainder, there being no particular estate to support it? Now the established rule of law is, that the event or contingency on which an executory devise is limited, must be of such a kind as to happen, if at all,
within

within the period of a life or lives in being, or twenty-one years after. *Fearne*, 314, 315 (a). *Cas. Temp. Talbot*, 228. *Stephens v. Stephens*, 2 *Mod.* 289. *Taylor v. Biddal*. Here the first devise is not within those limits; *Thomas Proctor* had no son born at the death of the testatrix, and if he ever should have one, such son would not necessarily be in orders, within twenty-one years after his birth. By the canons of the Church, no person can be admitted into deacon's orders before the age of twenty-three without a faculty, nor can he be ordained priest before twenty-four. *Gibs. Cod. tit. 6. c. 5*. The stat. 13 *Eliz. c. 12*. also is positive, that no person shall be admitted to a benefice with cure, except he be of the age of twenty-three at the least, and it was clearly the intention of the testatrix that the son of *Thomas Proctor* should be presented himself to the living. But it may be perhaps contended on the other side, that though the devise to the son of *Thomas Proctor* should be void as being too remote, yet that the devise over to *Thomas Moore* may take effect, as if the prior devise had not been made. But the devise to *Moore* is liable to the same objection on account of the remoteness of the contingency, as the other: for supposing there were no previous devise to the son of *Proctor*, the devise to *Moore* would be to him "if *Thomas Proctor* should have no son in orders;" but no time is fixed for his taking orders. And such a devise being void in its original creation, could not be made good by the subsequent circumstance of *Thomas Proctor* having no son, according to the doctrine established in *Goodman v. Goodright*, 2 *Bur.* 873.

On the part of the Defendants the arguments were as follow. The intention of the testatrix clearly was to exclude her heir at law; the Court therefore will construe the will with a view to that intention, and will not presume, that she meant that the son of *Thomas Proctor* should be in such orders as would defeat it, instead of those which *might* carry it into effect. As by means of a faculty or dispensation he might take deacon's orders at twenty-one, the Court will intend that those were the orders which he had in contemplation. The rules respecting an executory devise depend on the period when the devisee may come into the enjoyment of the thing devised. Now here the thing devised is the right of presentation, which a son of *Thomas Proctor* might have exercised within the time limited

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by law, by taking deacon's orders by virtue of a faculty, for it was not necessary to give effect to the devise that he should himself be the incumbent of the living; he might have presented some other person. There are three contingencies on which the devise depends, the first that of *Thomas Proctor* having a son, the second on that son being bred a clergyman, and the third, on his being in holy orders: but if either of those contingencies were good and the event never happened, the devise over to *Moore* might take effect, 2 *Black.* 704. *Longhead on dem. of Hopkins v. Phelps.* But supposing the prior devise to be bad, yet there is nothing to render void the devise to *Moore*: the limitations in the will are alternate; if *Proctor* should have a son in orders to take as devisee, *Moore* would be entirely excluded; this case therefore is not like those where the second devise is to take place after the first has been satisfied. And it is a rule of law, that where there are two limitations in a will, and the former is avoided either from the nature of its original creation, or by matter *ex post facto*, the latter shall have effect (a), 1 *Vin. Abr.* 103, 104. *Andrews v. Fulham*, 1 *Vezey*, 420. *Avelyn v. Ward*, 1 *Salk.* 229. *Scatterwood v. Edge*, *Prec. in Chanc.* 316. *Jones v. Westcomb*, 1 *Eq. Cas. Abr. S. C.* 1 *Salk.* 226. *Skin.* 408. *Goodright v. Cornish*, 1 *Wils.* 105. *Gulliver v. Wickett.* But secondly, as *Moore* was in esse at the death of the testator, and there was then no son of *Thomas Proctor*, the advowson vested in *Moore*, subject to be divested by the birth of such son. *Aleyn*, 81. *Udal v. Udal*, 2 *Rol. Abr.* 119.

The substance of the reply was, that in truth there was but one contingency, on which the devise to *Moore* was limited, which was that of *Proctor* having a son in holy orders; for the words "*bred a clergyman*" were otherwise insensible: this case therefore was materially different from *Longhead v. Phelps* where the contingencies were expressly in the disjunctive, and, where as the first was clearly good, viz. that of *John* and *Mary Phelps* dying without leaving issue male, the Court would not enter into the consideration of the second, which did not come

(a) This position seems to be founded on the dicta of *Lee*, Ch. J., in *Andrews v. Fulham*, and Lord *Hardwicke* in *Avelyn v. Ward*. But it will appear upon an examination of those cases, and the others in which

the same principle is recognized, that it is not applicable to a devise over limited after a prior devise, which prior devise is originally void from the remoteness of the contingency on which it depends.

in question. That in each of the other cases cited, the subsequent devise might have taken effect though the prior devise had not been in the will at all. But here, the devise to *Moore* depended on the former one, and could not take effect unless *Proctor* should have no son in orders, which was too remote an event; for the rule of law was, that an executory devise must be such, as not that the estate devised *might by bare possibility*, but *must necessarily* vest in the devisee, within the compass of a life in being, or twenty-one years after.

The Court (a) were very clearly of opinion, that the first devise to the son of *Thomas Proctor* was void, from the uncertainty as to the time when such son, if he had any, might take orders; and that the devise over to *Moore*, as it depended on the same event, was also void, for the words of the will would not admit of the contingency being divided, as was the case in *Longhead v. Phelps*, 2 Black. 704; and there was no instance in which a limitation after a prior devise, which was void from the contingency being too remote, had been let in to take effect, but the contrary was expressly decided in the House of Lords, in the case of *The Earl of Chatham v. Tothill*, 6 Brown Cas. in Parl. 451, in which the judges founded their opinion on *Butterfield v. Butterfield*, 1 Vezey, 134. Consequently the heir at law of the testatrix was intitled.

Judgment for the Plaintiff.

(a) Absent Mr. Justice Buller.

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Thursday,
Nov. 27th.

TO this action for goods sold and delivered, with the usual counts, the Defendant pleaded. 1. *Non assumpsit*, and

tom to be "that if any person be or hath been indebted to any other person within the said city," &c. it ought to aver that the Defendant in the plaint was indebted to the Plaintiff within the city (a).

(a) [This case has only decided that where the custom is stated to be "that if any person, &c. be indebted within the city," the Defendant must bring his case within the custom, as stated, and must shew the person indebted within the city, but not that the custom should be so stated; see *M^r Daniel v. Hughes*, 3 East, 379; accordingly it was held in *Banks v.*

Self, 5 Taunt. 234 (n.) that it is not necessary to aver the custom, nor consequently the fact that the Defendant in the plaint was indebted within the city. See also *James v. Williams*, 2 Chit. Rep. 438. *Harrington v. Macmorris*, 5 Taunt. 232. 1 Marsh. 35, S. C.; *Nonell v. Hullett*, 4 B. & A. 646. 1 Saund. 67 b. (n.) 5th Ed.]

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2dly. That the city of *London* is and from time whereof the memory of man is not to the contrary, hath been an ancient city, and that there now is, and from time immemorial hath been, a certain custom used and approved of within the same city, that is to say, that if any person *be, or hath been indebted* to any other person *within the said city*, in any sum of money, and for recovery thereof, such person affirm or hath affirmed a plaint in debt, in the court of his present Majesty or his predecessors, Kings or Queens of *England*, held or to be holden before the Mayor and Aldermen of the said city, for the time being, in the chamber of the *Guildhall* of the said city, within the said city, according to the custom of the said city, against such persons so indebted, and by virtue of such plaint it be or hath been commanded by the said court to any of the said serjeants at mace, and ministers of the said court, to summon such person named Defendant in the said plaint to appear in the same court, held before the Mayor and Aldermen of the said city for the time being, in the chamber of the *Guildhall* of the said city, to answer the Plaintiff in such plaint, and if such serjeant at mace and minister of the said court, by virtue of such precept return and certify, or hath returned and certified to the said court so holden as aforesaid, that the Defendant in such plaint hath or had nothing within the said city or the liberties thereof, whereby he can or could be summoned, nor is nor was to be found within the said city, and such Defendant at that court being solemnly called doth not appear, or hath not appeared, but makes or hath made default, and in the same court it be or hath been alleged by the Plaintiff in the said plaint, that any other person owes or hath owed to any such Defendant any sum of money amounting to the sum of the debt in such plaint specified, or any part thereof, then at the petition of the said Plaintiff, it is and hath been commanded by the said court, to one of the serjeants at mace and a minister of the said court, to attach such Defendant in such plaint, by such sum of money so being in the hands or custody of such other person, so that such Defendant appear at the same court, or at the then next court held or to be holden before the said Mayor and Aldermen as aforesaid, to answer such Plaintiff in the plea in such plaint specified; and if such serjeant at mace and minister of the said court, at the same or the then next court held or to be holden as aforesaid, return
and

and certify to the said court such Defendant to be attached by such sum of money so being in the hands or custody of such other persons, and the same sum in the hands and custody of such other person to be defended and kept, so that such Defendant in such plaint named appear at such same or the then next court held or to be holden as aforesaid, to answer such Plaintiff in the plea in such plaint specified, and if such Defendant at that, and three other courts from thence next severally held or to be holden before the Mayor and Aldermen of the said city as aforesaid, that is to say at four such courts, be or hath been solemnly called and appears not, or hath not appeared, but makes or hath made default, and such defaults according to the custom of the said city be recorded against such person Defendant after such attachment made as aforesaid, such Plaintiff in such plaint named, at every of such four courts in his proper person or by his attorney appearing, and offering himself against such Defendant, in the plea in such plaint specified, according to the custom of the said city, then at the last of the four courts, or at any court held or to be holden as aforesaid, after such four defaults recorded as aforesaid, at the petition of such Plaintiff in such plaint named, made to the said court, it is and hath been used for the said court to command such or any other serjeant at mace and minister of the said court, to warn such other person, according to the custom of the said city, to be and appear at any court afterwards to be holden before the said Mayor and Aldermen as aforesaid, to shew if any thing he hath or knows of to say for himself, why such Plaintiff in such plaint named ought not to have execution of such sum so attached as aforesaid, and if at such court such serjeant at mace return and certify to the same court such other person, in whose hands such sum of money is or hath been attached as aforesaid, to be warned according to the custom of the said city, to be and appear in the same court to shew cause as aforesaid, and if such person so warned, being solemnly called at such court, do not appear, or hath not appeared, but makes or hath made default, then it is, and time immemorial as aforesaid hath been used and accustomed for the said court to award such Plaintiff to have execution for such sum so attached as aforesaid, to satisfy such Plaintiff the debt in such plaint specified, or so much thereof as such sum so attached extends or hath extended to satisfy,

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satisfy, by sufficient pledges to be found and given by such Plaintiff in such plaint named, in the same court, according to the custom of the same city, to restore to such Defendant such sum of money so attached as aforesaid, if such Defendant within a year and a day from thence next ensuing, come, or hath come into the said court holden as aforesaid, and disproves or hath disproved or avoided the said debt in the said plaint mentioned, according to the custom of the said city; and that after such pledges found, and execution had of such sum so in the hands and custody of such other person attached and defended, by the Plaintiff in such plaint named, such other person in whose hands or custody such sum is or hath been attached as aforesaid, is or hath been discharged against such Defendant of the said sum so attached and had in execution as aforesaid, and such Defendant in such plaint named, is or hath been discharged against the said Plaintiff of so much of his debt in such plaint demanded by such Plaintiff, so long as such judgment and execution remain in force and effect, not revoked or disproved by such Defendant. And if such sum of money so attached and defended and in execution, amounts not, nor hath amounted to the whole sum of the debt, in and by the said plaint demanded by such Plaintiff against such Defendant, then such Plaintiff by the custom of the said court is, and time immemorial as aforesaid hath been used and accustomed to have process against such Defendant, according to the custom of the said city, for the residue of his said debt by him in such plaint demanded. And the said *Anthony* further saith, that the said custom, and all other customs of the said city, obtained and used in the same city, during all the time aforesaid, by authority of a parliament of *Richard* the Second, late King of *England*, after the Conquest, holden at *Westminster*, in the seventh year of his reign, were ratified and confirmed to the then Mayor and Commonalty and Citizens of the said city, and their successors. And the said *Anthony* further says, that one *William Ludlam* before the suing out of the original writ of the said *Samuel* against the said *Anthony*, to wit, on the 9th day of *June*, in the year of our Lord 1792, in his own proper person came into the court of our Lord the now King, before the Mayor and Aldermen of the said city, in the chamber of the *Guildhall* of the said city, situate and being in the parish of *Saint Michael Bassishaw* in the ward of

of *Bassishaw* in *London* aforesaid, according to the custom of the said city, and then and there in the same court (a) affirmed a certain *plaint* against the said *Samuel*, in a *plea of debt upon demand* for 90*l.* of lawful money of *Great Britain*. And the said *William Ludlam* then and there in the same court, according to the custom of the same city, found pledges to prosecute the said *plaint*, to wit, *John Doe* and *Richard Roe*, and then and there appointed in his stead *William Windall* his attorney against the said *Samuel* in the *plea* of the said *plaint*, according to the custom of the said city, and by his said attorney then and there prayed process to be thereupon made to him against the said *Samuel*, according to the custom of the said city; and it was then and there granted to him, &c. whereupon at the petition of the said *William Ludlam*, made to the said court by his said attorney, and by virtue of the said *plaint* it was commanded by the said court to *John Furnival*, one of the serjeants at mace of the said court, that he according to the custom of the said city should summon by good summons the said *Samuel* to appear at the same court, so as aforesaid holden before the Mayor and Aldermen of the said city in the chamber of the *Guildhall* of the city aforesaid, to answer to the said *William Ludlam* in the *plea* in the said *plaint* specified, and that the said *John Furnival* should return and certify what he should do by virtue of the said precept; and afterwards, to wit, at the same court, the said serjeant at mace according to the custom of the said city returned and certified to the same court that the said *Samuel* had nothing within the said city or the liberties thereof whereby he could be summoned, nor was he to be found within the same: and thereupon the said *Samuel* was then and there at the same court solemnly called, and did not appear, but made default: and thereupon afterwards and before the suing out of the original writ of the said *Samuel* against the said *Anthony*, to wit, on the same day and year last mentioned, at the same court it was alleged by the said *William Ludlam* by his said attorney, that the said *Anthony* owed to the said *Samuel* thirty pounds, seven shillings and ten-pence in monies numbered, as the proper monies of the said *Samuel*, and then had and detained the same in his hands and custody: and therefore the said *William Ludlam* by his said attorney prayed process according

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(a) Here it ought to have been averred, that *Morris* was indebted to *William Ludlam* within the city.

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to the custom of the said city to attach the said *Samuel*, by the said thirty pounds, seven shillings and ten-pence, so being in the hands and custody of the said *Anthony*, so that the said *Samuel* might appear at the next court of our said Lord the King to be holden before the Mayor and Aldermen of the said city, in the chamber of the *Guildhall* of the said city, to answer the said *William Ludlam* in the plea in the said plaint specified: whereupon, at the petition of the said *William Ludlam*, it was commanded by the same court to the said serjeant at mace and minister of the said court, that he according to the custom of the said city, should attach the said *Samuel* by the said thirty pounds, seven shillings and ten-pence, so being in the hands and custody of the said *Anthony* as aforesaid, and the same in his hands and custody defend and keep, according to the custom of the said city, so that the said *Samuel* might appear at a Court of our said Lord the King, to be holden before the said Mayor and Aldermen of the said city, in the chamber of the *Guildhall* of the city aforesaid, on *Tuesday* the 12th day of *June*, in the year aforesaid, according to the custom of the said city, to answer to the said *William Ludlam* in the plea in his said plaint specified, and that the said serjeant at mace and minister of the said court should then return and certify to the said court

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the said 12th day of *June* in the said year of our Lord 1792, to answer to the said *William Ludlam* in the plea in his said plaint specified: and thereupon the said *Samuel* at the same court was solemnly called, and did not appear, but then and there made a first default, which said first default at the same court was recorded according to the custom of the said city; and thereupon according to the custom of the said city, a further day was given by the same court to the aforesaid *Samuel* to appear at the then next court of our said lord the King, to be holden before the Mayor and Aldermen of the said city in the chamber of the *Guildhall* of the city aforesaid, on *Wednesday* the 13th day of *June* then next following, to answer the said *William Ludlam* in the plea in his said plaint specified; and the same day was then and there by the same court given to the said *William Ludlam* in the plea aforesaid, according to the custom of the said city; at which said next court holden before the Mayor and Aldermen of the said city in the chamber of the *Guildhall* of the city aforesaid, on the day and year last mentioned, the said *William Ludlam* by his said attorney appeared and offered himself against the said *Samuel* in the plea in his said plaint specified according to the custom of the said city; and thereupon at the same court the said *Samuel* was again solemnly called and did not appear, but then and there made a second default, which said second default was recorded at the same court according to the custom of the said city; and thereupon according to the custom of the city, a further day was given by the said court to the aforesaid *Samuel*, to appear at the then next court of our said lord the King, to be holden before the Mayor and Aldermen of the said city in the chamber of the *Guildhall* of the city aforesaid, on *Tuesday* the 14th day of *June* then next following, to answer the said *William Ludlam* in the plea in his said plaint specified; and the same day was then and there by the same court given to the said *William Ludlam* in the plea aforesaid, according to the custom of the said city; at which said next court holden before the Mayor and Aldermen of the said city in the chamber of the *Guildhall* of the city aforesaid, on the day and year last mentioned, the said *William Ludlam* by his said attorney appeared and offered himself against the said *Samuel* in the plea in his said plaint specified, according to the custom of the said city; and thereupon at the same court the said *Samuel* was again solemnly

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solemnly called and did not appear, but then and there made a third default which was recorded at the same court, according to the custom of the said city; and thereupon according to the custom of the said city, a further day was given by the said court to the aforesaid *Samuel* to appear at the then next court of our said lord the king, to be holden before the Mayor and Aldermen of the said city in the chamber of the *Guildhall* of the city aforesaid, on *Tuesday* the 15th day of *June* then next following, to answer to the said *William Ludlam* in the plea in his said plaint specified, and the same day was then and there by the same court given to the aforesaid *William Ludlam* in the plea aforesaid, according to the custom of the said city; at which said next court holden before the Mayor and Aldermen of the said city at the *Guildhall* of the city aforesaid, on the day and year last mentioned, the said *William Ludlam* by his said attorney appeared, and offered himself 'against the said *Samuel* in the plea in his said plaint specified, according to the custom of the said city; and thereupon at the same court, the said *Samuel* was again solemnly called and did not appear, but then and there made a fourth default, which default was recorded at the same court according to the custom of the said city; and thereupon afterwards, and after the said four defaults had been recorded at the said court against the said *Samuel* in the plea aforesaid, according to the custom of the said city, the said *William Ludlam* by his said attorney prayed process according to the custom of the said city to warn the said *Anthony* the garnishee, to be and appear in the court of our said lord the king, to be holden before the Mayor and Aldermen of the said city in the chamber of the *Guildhall* of the city aforesaid, to shew cause why the said *William Ludlam* ought not to have execution of the said thirty pounds seven shillings and ten-pence so attached in his hands and custody as aforesaid; whereupon at a court of our said lord the king holden before the Mayor and Aldermen of the said city in the chamber of the *Guildhall* of the city aforesaid, on *Monday* the 16th day of *July* in the year aforesaid, at the petition of the said *William Ludlam* made in the said court, it was commanded by the same court to the said serjeant at mace, that he according to the custom of the said city, should warn and make known to the said *Anthony* to be and appear in the court of our said lord the king, to be holden before the Mayor
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and Aldermen of the said city in the chamber of the *Guildhall* of the city aforesaid, on *Thursday* the 19th day of *July* then next following, to shew cause why the said *William Ludlam* ought not to have execution of the said thirty pounds seven shillings and ten-pence so attached in his hands and custody as aforesaid, and that the said serjeant at mace should then return and certify to the said court what he should do by virtue of the said last mentioned precept; and the same day was then and there given by the said court to the said *William Ludlam*, to be there, &c. At which said court holden before the Mayor and Aldermen of the said city in the chamber of the *Guildhall* of the city aforesaid on the day and year last mentioned, the said *William Ludlam* by his said attorney appeared, and the said serjeant at mace then and there returned and certified to the same court, that he by virtue of the said last mentioned precept to him directed, and according to the custom of the said city, had warned and made known to the said garnishee to be and appear at this same court, to shew cause as above commanded; and thereupon at the same court, the said *Anthony* was solemnly called according to the custom of the said city, and did not appear, but then and there made default, whereupon according to the custom of the said city, it was considered by the said court that the said *William Ludlam* should have execution of his said thirty pounds seven shillings and ten-pence in monies numbered so attached as aforesaid, and that he the said *William Ludlam* should retain and hold the said thirty pounds seven shillings and ten-pence, in full satisfaction of the like sum of thirty pounds seven shillings and ten-pence parcel of the said debt in the said plaint mentioned, by sufficient pledges to be found and given by the said *William Ludlam* in the same court according to the custom of the said city, to restore to the said *Samuel* the said sum of thirty pounds seven shillings and ten-pence, so attached as aforesaid, if the said *Samuel* within a year and a day from thence next ensuing, should come into the said court, and disprove or avoid the said debt in the said plaint mentioned, according to the custom of the said city. Whereupon the said *William Ludlam* at the same court, according to the custom of the said city, found sufficient pledges, to wit *Henry Anderson* of *Three Cranes Wharf, Queen Street, Merchant*, and *George Mackreth* of *Billiter Lane, in the city of London, Merchant*, citizens of the said city, to restore

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restore to the said *Samuel* the said sum of thirty pounds seven shillings and ten pence, so attached as aforesaid, if the said *Samuel* within a year and a day from thence next ensuing, should come into the said court holden as aforesaid, and disprove and avoid the said debt, in the said plaint mentioned, according to the custom of the said city. And thereupon the said *William Ludlam* at the same court, by the consideration of the same court, had execution of the said thirty pounds seven shillings and ten pence, according to the tenor of the judgment aforesaid in that behalf given; as by the record and proceedings thereof now remaining in the chamber of the *Guildhall* of the city of *London* aforesaid more fully appears. And the said *Anthony* in fact says, that the said thirty pounds seven shillings and ten pence so attached as aforesaid, and of which the said *William Ludlam* hath execution by virtue of the said judgment, are part and parcel of the said several sums of money in the said declaration mentioned, and not other or different; and that the said *Samuel Morris* the now Plaintiff, and the said *Samuel Morris* in the said plaint of the said *William Ludlam* mentioned, are one and the same person, and not other or different; and that the said *Anthony Ludlam* the now Defendant, and the said *Anthony Ludlam* in the aforesaid judgment and proceedings mentioned, are one and the same person, and not other or different: and that the said judgment and execution are still in force, and not in the least by the said *Samuel* disproved or avoided: and the said *Anthony* farther says, that he the said *Anthony* at the time of suing out the original writ of the said *Samuel*, against the said *Anthony*, was not nor is indebted to the said *Samuel*, in more money than the said sum of thirty pounds seven shillings and ten pence so attached and

[371] taken in execution by the said *William Ludlam* as aforesaid, by virtue of the judgment aforesaid, and that the said sum of thirty pounds seven shillings and ten pence, in which the said *Anthony* was indebted to the said *Samuel*, is the very same and identical sum of thirty pounds seven shillings and ten pence, so attached and taken in execution by the said *William Ludlam* by virtue of the judgment aforesaid, and this he the said *Anthony* is ready to verify, wherefore &c.

To this plea there was a special demurrer, for that it amounted to the general issue, and was in other respects &c.

In support of the demurrer, *Watson*, Serjt., argued that the
plea

plea was bad, because it neither averred that the Defendant in the foreign attachment was indebted to the Plaintiff, nor that the debt arose within the city of *London*, which were necessary averments. *Lutw.* 977. *North v. Winskell*, 1 *Roll. Abr.* 553. *Latch.* 208. *Hern v. Stubbers*, *Cro. Eliz.* 598. *Paramore v. Pain*, 830. *Coke v. Brainforth, Co. Entr.* 139, 140. *Dyer* 196 *b.* 3 *Wils.* 267. *Fisher v. Lane*. The custom therefore as stated, was not pursued.

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Adair, Serjt., contra. Though it is assigned for cause of demurrer, that the plea amounts to the general issue, yet it is a good plea even to an action on the case, 1 *Roll. Abr.* 552. and indeed the rule is, that whatever confesses and avoids the cause of action, *may* be pleaded. With respect to the objection, that there is no averment of a debt due from the Defendant in the attachment to the Plaintiff, such an averment is not material, where, as in the present case, there are three parties in the attachment, for the proper point to be put in issue then is, whether the garnishee has money or effects of the Defendant in his hands(*a*). Where indeed the Plaintiff and the garnishee are one and the same person, there it is highly reasonable that he should shew the consideration of the judgment, of which he himself is to have the advantage, by gaining a priority over other creditors.

The Court seemed to admit the distinction made by *Adair*, between the case of the garnishee being a third person and that of the Plaintiff attaching a debt in his own hands(*b*), as to the necessity of averring the existence of the original debt: but they were clearly of opinion that as the Defendant had stated the custom to be, that “if any person be or hath been indebted &c.” it ought to have been strictly pursued, and therefore that the plea was bad for want of such an averment. But leave was given to amend.

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(*a*) But though the general question in issue upon an attachment is, whether the garnishee at the time of the attachment is made, or at any time after, had money or goods of the Defendant in his hands, *Bohun, Priv. Londini*, 191, yet the debt from the

Defendant to the Plaintiff is also traversable by the garnishee, *ibid.* 208.

(*b*) [But see *Nonell v. Hullett*, 4 B. & A. 649. where *Bayley, J.*, intimated an opinion that a custom to attach a debt in a man's own hands would not be a good custom.]

1794.

Thursday,
Nov. 27th.

CURLING *against* INNES.

A. having privilege of parliament, owes *B.* a sum of money, for which *B.* sues him; in consequence of which *C.* enters into a bond together with *A.* conditioned for the payment to *B.* of such sum as *B.* shall recover in the action against *A.*, in pursuance of the stat. 4 Geo. 3. c. 33. In that action *B.* obtains judgment, and puts the bond in suit against *C.* To the action on the bond, *C.*, being under terms by a judge's order to plead *issuably*, may plead in bar that a writ of error is depending on the judgment against *A.* (a).

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THE Plaintiff brought an action in this court for 3000*l.* against *Beckford* a trader having privilege of parliament, on his bond; in consequence of which *Beckford* together with the Defendant *Innes* and *Keighley* entered into another joint and several bond for 6000*l.* in pursuance of the stat. 4 Geo. 3. c. 33. conditioned for the payment to the Plaintiff of such sum as he should recover in that action; and judgment being afterwards entered up against *Beckford*, the second bond was put in suit, when the Defendant took out a summons for time to plead, and a judge's order was made, allowing him time for that purpose on the usual terms of *pleading issuably*, rejoining gratis, and taking short notice of trial. Under this order he pleaded after oyer of the bond and condition, "*actio non*, because he says that although the said *Jesse Curling*, after the making of the said writing obligatory, to wit, in *Hilary* term in the year of our Lord 1794 in the court of our lord the King of the bench, at *Westminster* in the county of *Middlesex*, by the consideration and judgment of the said court, recovered against the said *Richard Beckford* in the said action in the said condition of the said writing obligatory mentioned, as well a certain debt of 7000*l.* as 2*l.* 15*s.* which were then and there adjudged to the said *Jesse Curling* as well for the damages which he had sustained on occasion of the detaining that debt, as for his costs and charges by him in and about his suit in that behalf expended; yet that the record and process of the said judgment, so as aforesaid recovered, with all things touching the same, afterwards, to wit, in *Hilary* term, in the said year of our Lord 1794, by virtue of a certain writ of our said lord the King for correcting errors, directed to our said lord the King's trusty and well beloved Sir *James Eyre*, Knt. his Chief Justice of the Bench, at the suit of the said *Richard Beckford*, were sent and had into the court of our said lord the King before the King himself, the said court then and still being holden at *Westminster* in the county of *Middlesex*, and such proceedings were thereupon had in the said court of our said lord the King before the King himself there, that afterwards to wit in *Easter* term in

(a) [As to what shall be deemed an issuable plea, see Tidd's Pr. 477. 5th ed.]

" the

“ the said year of our Lord 1794, the judgment of the said
 “ Court of our said lord the King of the bench, was by the
 “ consideration of the said court of our said lord the King be-
 “ fore the King himself, in all things affirmed : and the said
 “ *William Innes* further saith that afterwards, to wit, in *Easter*
 “ term in the said year of our Lord 1794, the record and pro-
 “ cess of the said judgment, and all things touching the same,
 “ were by virtue of a certain writ of our said lord the King for
 “ correcting errors, directed to our said lord the King’s right
 “ trusty and well beloved *Lloyd Lord Kenyon* Chief Justice
 “ assigned to hold pleas before our said lord the King, at the
 “ suit of the said *Richard Beckford*, sent and had before our
 “ said lord the King, and the Lords spiritual and temporal in
 “ parliament assembled, at *Westminster* aforesaid, which said
 “ last mentioned writ for correcting errors is still depending
 “ and undetermined ; and the said judgment as yet is neither
 “ affirmed nor reversed by the Lords spiritual and temporal in
 “ parliament assembled. And this he the said *William Innes*
 “ is ready to verify, wherefore &c.”

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Adair, Serjt., obtained a rule to shew cause why this plea should not be withdrawn, as not being an issuable plea within the terms of the order, the attorney also making an affidavit, that he verily believed the writ of error was brought merely for delay. *Le Blanc*, Serjt, shewed cause, contending that the plea went to the merits; this was an action against a surety on a contract of indemnity, and the plea shewed that the debt was not due, which the sureties undertook to pay, for while the writ of error was depending, it could not be said that the debt was really due.

Adair, in support of the rule, said that this plea could not be pleaded in bar, but that if it were pleadable at all, it must be in abatement. *Carth.* 1. But in fact it was good neither in bar nor abatement, *Skinn.* 388, for the action was of the same nature with an action of debt on a judgment, and in such an action, the plea was holden to be bad in the authorities cited. It is to be observed too, that one object of the stat. 4 *Geo.* 3. c. 33. was to prevent delay in the recovery of debts from traders who were members of parliament, and this must be allowed to be a dilatory plea.

The Lord Chief Justice and *Heath*, J. (a) seemed at first in- [374]

(a) Absent *Buller*, J.

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clined to adopt *Adair's* argument, but *Rooke, J.*, being decidedly of opinion that the surety could not be liable, till the money was actually recovered against the principal in the former action, and that while the writ of error was depending the money was not actually recovered,

The rule was discharged.

Thursday,
Nov. 27th.GUTTERIDGE *against* SMITH.

Payment of money into court on the whole declaration, in an action on a bill of exchange, is such an admission of the validity of the bill, as to prevent the necessity of proving the hand-writing of the drawer (a).
Q. Whether after such payment there can be a nonsuit (b)?

THIS was an action brought by the payee against the drawer of two bills of exchange, to which *non assumpsit* was pleaded, and 3*l.* paid into court on the whole declaration. At the trial the Plaintiff was unable to prove the hand-writing of the drawer, and therefore, under the direction of the Lord Ch. J., was nonsuited. But a rule was granted to shew cause why the nonsuit should not be set aside and a new trial had, on two grounds: 1. that the payment of money into court on the whole declaration, was such an admission of the cause of action, as superseded the necessity of proving the hand-writing of the drawer of the bills; 2. that after such payment, there could not be a nonsuit.

And now *Watson, Serjt.*, shewed cause. There is no case to prove that the payment of money into court necessarily admits the whole cause of action. In *Cox v. Parry*, 1 *Term Rep. B. R.* 464, it was stated by *Ashhurst, J.*, in the name of the court, that by paying money into court, the Defendant had admitted that the Plaintiffs were entitled to maintain their action on the policy, to the amount of that sum: but that he had admitted nothing more; and the same doctrine was holden by Lord *Kenyon* in *Baillie v. Cazelet*, 4 *Term Rep. B. R.* 579. It cannot therefore be fairly urged, that such payment admits the signature of a written instrument. In *Stodhart v. Johnson*, 3 *Term Rep.* 657, it is observed by Mr. Justice *Buller*, that it is expressed in the rule for paying money into court, that if the Plaintiff will not accept it with the costs, it shall be struck out of the declaration, and then it is not considered as part

(a) [Accord. *Guilod v. Nock*, 1 Esp. N. P. C. 347. *Bennet v. Francis*, 2 Bos. & Pul. 556. *Randall v. Lynch*, 2 Campb. N. P. C. 357.]

(b) [So the Plaintiff may be nonsuited after judgment by default against one of two Defendants. *Murphy v. Doulau*, 5 B. & C. 178.]

of

of the declaration; and if so the Plaintiff may be afterwards nonsuited. 2 *Salk.* 597. *Elliott v. Callow.*

**Le Blanc*, Serjt., *contra*. When money is paid into court generally, it is the same as if it were paid in on every count, and then it admits the whole cause of action, which is the doctrine laid down in *Cox v. Parry*. With respect to *Stodhart v. Johnson*, the only question there related to the costs; and as to *Baillie v. Gazelet*, the money was in that case paid in on a particular count, a practice designed to prevent the advantage which the Plaintiff derives from a general payment on the whole declaration. But in *Watkins v. Towers*, 2 *Term Rep. B. R.* 275, the Court held, that payment of money into court superseded the necessity of the proof which the Plaintiff must otherwise have adduced, and approved of the rule laid down by Mr. J. *Buller*, at the trial of the cause, that the payment of money into court was an admission of the contract, and therefore that it was not necessary to prove the deed. And in *Jenkins v. Tucker*, *ante*, vol. i. 90, Lord *Loughborough* held, that after paying money into court there could be no nonsuit.

Lord Chief Justice EYRE. Though I feel some difficulties in this case, I am not sorry that the discussion of it has taken place, as it may answer the purpose of informing the practisers what the effect is of paying money into court, and may serve to correct an extravagant notion that has prevailed, that after such payment there can be no nonsuit. If this were true, it would reduce the state of the cause after money were so paid in to that of a mere writ of inquiry. But I hold that after payment of money into court there may be a nonsuit, judgment as in case of a nonsuit, a demurrer to evidence, a plea *puis darrein continuance*, in short, that the cause goes on substantially in the same manner as if the money had not been paid in at all. In the case which was decided in this court (a), Lord *Loughborough* appears to have been of opinion that after payment of money into court there could be neither a demurrer to evidence, nor a nonsuit. But the rest of the court do not seem to have concurred with his Lordship in that opinion; and my Brother *Heath*, who tried the cause a second time, notwithstanding the money was paid into court on the whole declaration, directed the jury to confine their attention to the funeral expences, and rejected the other evidence, being of

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opinion that the debts of the deceased, which the Plaintiff had paid in the absence of the husband, could not be recovered.

* Yet it is difficult to say, that money paid in generally shall be applied to one part of the demand, and not to another. So in the case in the King's Bench on the policy of insurance (*a*), though the Court held that by paying money into court the cause of action was admitted to a certain extent, yet the Defendant was permitted to object to the policy itself, and the Plaintiff did not recover. But in the other case (*b*), when the Plaintiff was going to prove the deed, my Brother *Buller* thought it not necessary, as he held that the paying money into court was an admission of the whole contract, and the Court decided according to that opinion. It appears therefore on the authorities, to be loosely and uncertainly stated what the real effect is of paying money into court, and there is nothing to shew that the cause is not, in all material respects, in the same situation after payment as before. It is indeed an act which affords evidence of the ground of action, and so far it ought to be admitted, and no farther; as for instance, in an action on a promissory note for 20*l.*, the payment of 5*l.* into court would have the same effect as if 5*l.* were paid on the note before action brought, and would afford a just inference for the jury to draw of the existence of a debt. But I have very great doubts whether it ought to go so far as to admit written instruments so as to supersede the necessity of proving them, and all other circumstances which depend on parol evidence, for I cannot distinguish between writings and other circumstances which constitute the ingredients of the demand; if it be an admission of the one, it seems also to be an admission of the other. The practice of paying money into court on particular counts, removes the perplexity in great measure, because in that case there is room to distinguish the specific demand which the Defendant means to admit. But still there is a difficulty remaining, how far the payment is evidence of the whole ground of action.

HEATH, J. (*c*) I have looked into the books, in order to discover the origin of this proceeding of paying money into court, but without being able to fix the period of its commencement,

(*a*) *Cox v. Parry*, 1 Term Rep. B. R. 464.

(*b*) *Watkins v. Towers*, 2 Term Rep. B. R. 275.

(*c*) Mr. J. *Buller* was absent.

though

though I think it highly probable that it took its rise early in the present century (a). At that time the statute 4 *Anne* c. 16. was passed, the 13th section of which enacts, that if at any time, pending an *action on a bond with a penalty, the Defendant shall bring into the Court, where the action shall be depending, the principal, interest and costs, the money so brought in shall be taken to be in full satisfaction and discharge of the bond. Now it appears to me that from the equity of this statute, extended to simple contracts, the practice now in use of paying money into court arose, being designed to protect a Defendant against a litigious Plaintiff, by giving him the advantage of a tender, when he is in fact too late to make one. If the money be taken out of court, it operates as payment of so much ; if it be not taken out, it operates as a tender. Coming in lieu of a tender, it has all the effect which a tender would have had, and it is clear that after a tender the Plaintiff cannot be nonsuited (b). So in the present instance I am of opinion that the payment of money into court had the effect of admitting the hand-writing of the drawer of the bills, so as to prevent a nonsuit.

ROOKE, J. Whether the payment of money into court be an admission of the validity of a written instrument, seems to me to depend on the nature of the instrument itself. If it be paid in on a promissory note, as for instance 10*l.* on a note for 50*l.*, it is an admission that the Defendant owes the Plaintiff so much by virtue of that note, and therefore it admits the note itself, though not the whole sum demanded (c). So on a policy of insurance, where the Plaintiff goes for a total loss, though it may admit the policy itself, yet it does not admit that the Defendant is liable for more than the sum paid in. The principle which governs other payments of money, seems to be the same as that which respects payment of money into court, viz. that where there are several demands, the party paying may apply the money to whichever debt he thinks proper, but if he does not, the receiver may so apply it. *Goddard v. Cox*, *Bull. N. P.*

(a) ["I remember the time when paying money into court was not an admission of any thing." *Per* Sir J. Mansfield, *Rucker v. Palsgrave*, 1 *Campb. N. P. C.* 558.]

(b) [Accord. *Harding v. Spicer*, 1 *Campb. N. P. C.* 327. But it is now settled that the Plaintiff may be non-

sued after a plea of tender. *Anderson v. Shaw*, 3 *Bingh.* 290.]

(c) [Vide *Mellish v. Allnutt*, 2 *M. & S.* 106. *Rucker v. Palsgrave*, 1 *Campb. N. P. C.* 557. 1 *Taunt.* 419. *S. C.* *Storvold v. Brewin*, 2 *B. & A.* 116. *Long v. Greville*, 3 *B. & C.* 11.]

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174. So a Defendant paying money into court, may, if he pleases, apply it to a particular count; and if he does not, but pays it in generally, then the Plaintiff may make the application (a). In this case it was in the Plaintiff's power to apply the money to the particular count on the bills of exchange, and being so applied, it seems to admit that the Defendant signed them.

Rule absolute for a new trial.

(a) [See *Ribbans v. Crickitt*, 1 B. & P. 264. that payment of money into court is an admission of a legal demand only, and that money so paid

cannot be applied towards satisfying an illegal contract; and see *Wright v. Laing*, 3 B. & C. 165.]

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Wednesday,
Nov. 27th.

MELLISH and Another *against* SIMEON.

A. in England draws a bill of exchange on B. in a foreign country, which after having been negotiated through another foreign country is presented to B. who refuses to pay it, on account of the law of the country in which he resides having prohibited such payment. The drawer is liable for the whole amount of the re-exchange between the different countries (a).

ON the 9th of July 1793, two bills of exchange were drawn by Simeon in London, on Boyd and Co. in Paris, one for 35000, the other for 36000 *livres Tournois*, amounting together to 603*l.* 19*s.* 10*d.* sterling, according to the rate of exchange between London and Paris, of 6½*d.* for the French crown of three *livres*, and payable to the order of Mellish and Co. who indorsed them in London to Jeyssset and Co. at Amsterdam. Jeyssset and Co. indorsed them to Meryolet at Amsterdam, and Meryolet to Androine at Paris. When they were presented for acceptance, Boyd and Co. refused to accept them, but promised that they should be paid when they became due.

In the mean time the French convention passed a decree prohibiting the payment of any bills drawn in any of the countries at war with France, and of course the bills in question were not paid. In consequence of this, they were sent back by Androine to Meryolet at Amsterdam, protested for non-acceptance and non-payment, and at the same time Androine drew another bill on Meryolet for the amount of them at the rate of 18½ *groots* for the French crown of three *livres*, for the re-exchange between Paris and Amsterdam, together with the ordinary charges, which bill Meryolet paid, and was reimbursed by Jeyssset and Co. by compromise between them, at the rate of 18 *groots* for the French crown, amounting to 905*l.* 13*s.* 9*d.* sterling, for which sum, together with charges at Amsterdam, and the re-exchange

(a) [Vide *Pollard v. Herries*, 3 Bos. & Pul. 335. *De Tastat v. Baring*, 2 Campb. N. P. C. 65.]

between

between that place and *London*, making in the whole 913*l.* 4*s.* 3*d.* sterling, *Jeysset* and *Co.* drew a bill on *Mellish* and *Co.*, which they paid, and took back the former bills, on which they brought the present action against *Simeon* the drawer, and recovered a verdict for the whole sum of 913*l.* 4*s.* 3*d.* And now *Le Blanc*, Serjt., moved for a new trial, on the ground that the Defendant was not liable for the loss on the re-exchange. It is true, he said, that the drawer of a bill of exchange undertakes by the act of drawing it that the drawee shall be found in the place where he is described to be, and shall have effects in his hands, but the undertaking does not extend to the case of a prohibition to accept or pay the bill, imposed by the law of a foreign country in which the drawee resides. When a person takes a bill, circumstanced as this was, he must submit to the laws of that country. There was no default in the drawer; he therefore cannot in justice be liable for more than the sum he originally received for the bills, with interest, and the expences of protesting them. [379]

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LORD CHIEF JUSTICE EYRE. I see no distinction between this case and the common one of a bill being refused payment. The drawer must pay for all the consequences of the non-payment, and the loss on the re-exchange seems to me to be a part of the damages arising from the contract not being performed. I thought indeed at the trial, that it might be a question whether the drawer were liable for the re-exchange occasioned by the circuitous mode of returning the bills through *Amsterdam*, but the jury decided it.

BULLER, J. What is the engagement of the drawer of a bill of exchange? He undertakes that the bill shall be paid when due. If it be not paid, it is not necessary for the holder to inquire for what reason it is not paid, and if the holder has been guilty of no default, the drawer is answerable for the amount of the bill; and if he is liable for the bill, he must also be liable for the re-exchange, which is a consequence of the bill not being paid.

HEATH, J., of the same opinion. He who undertakes for the act of another, undertakes that it shall be done at all events.

ROOKE, J., of the same opinion.

Rule refused.

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Wednesday,
Nov. 27th.

MITCHELL and Others, Assignees of ROBERTSON, a Bankrupt, *against* COCKBURNE, surviving Assignee of ELIZABETH TYLER, a Bankrupt.

A. and B. are engaged in a partnership in insuring ships, &c. which is carried on in the name of A., and A. pays the whole of the losses. Such a partnership being illegal by stat. 6 Geo. 1. c. 18., A. cannot maintain an action against B. to recover a share of the money that has been so paid (a).

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THE facts on which this case arose, were the following:—The two bankrupts were engaged in a partnership for the purpose of insuring ships, &c. which was carried on in the name of *Robertson*, who, previous to his bankruptcy, had paid a much larger sum for losses than he had received for premiums. One moiety of this sum his assignees claimed to be due to them from *Tyler*, and it was agreed between them and the assignees of *Tyler*, that the account should be referred to arbitrators, to ascertain the amount of the demand. The arbitrators awarded 1636*l.* 13*s.* 6*d.* to be due to the estate of *Robertson* on the score of insurances, and his assignees accordingly petitioned the Lord Chancellor to *have that sum allowed them out of the estate of *Tyler*. Upon which his Lordship made an order that the petitioners should be at liberty to bring such action at law as they should be advised, and that the assignees of *Tyler* should not set up her bankruptcy in defence of that action.

In consequence of this, the present action was brought, the declaration containing only two counts, the first, for money had and received by the Defendant to the use of the Plaintiffs; the second, on an account stated (*b*), and the Defendant pleaded the general issue.

At the trial the Plaintiffs were nonsuited, the Lord Ch. J. being of opinion that as partnerships in the business of insuring were prohibited by the stat. 6 Geo. 1. c. 18. no action could be maintained on a transaction which arose out of such a partnership, but the point was reserved for the opinion of the court. And now, a rule having been obtained to shew cause why the nonsuit should not be set aside, *Le Blanc* and *Heywood*, Serjts., shewed cause. This action is brought in affirmance of the contract of partnership, but such a contract is declared to be void by the stat. 6. Geo. 1.; no action therefore which goes to affirm it can be supported. Upon this principle Lord *Kenyon* decided

(a) [Vide *ex parte* Bell, 1 M. & S. 751. *Simpson v. Bloss*, 2 Marsh. 542. and the cases cited *post.* p. 382. note (c).]

(b) As there was no count in the

declaration for *money paid*, and no account in fact stated, the Plaintiffs would probably have been nonsuited, though the objection to the principle of the action had not been made.

a similar

a similar case at *Nisi Prius*, *Sullivan v. Greaves*, Sittings after *East*. 29 *Geo. 3. Park's Law of Insurance*, 8. There is a difference indeed where a third person pays money for two others who are jointly engaged in an illegal transaction, and one of them with the consent of the other, repays the whole to that third person, as was the case in *Petrie v. Hannay*, 3 *Term Rep. B. R.* 418. where the party who had so repaid the money, recovered a moiety for his companion, as having paid a debt due from him. But even there Lord *Kenyon* doubted whether the action could be maintained. And in *Faikney v. Reynous*, 4 *Burr.* 2069. the Court proceeded on the ground, that the transaction was fair as between the parties to the bond, money being lent by one man to another to pay the differences of stock transactions.

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Adair and Cockell, Serjts., *contra*. The object of the statute 6 *Geo. 1. c. 18.* was to give protection to the insuring companies, and to prevent a competition between them and any other persons who might choose to insure in partnership. Such a partnership therefore as the statute meant to prohibit, could only be an open and ostensible one, which might gain credit in opposition to the companies. But here only one party appeared as the insurer, on whose single security the insured relied. And this sort of contract has nothing in it immoral or against public policy; it bears therefore no analogy to the instances of gaming and stock-jobbing.

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Lord Ch. J. EYRE. This question depends on the true construction of the statute 6 *Geo. 1. c. 18.* By that act the two corporations became the purchasers of the exclusive privilege of insuring on a joint stock, and to give effect to that privilege all other persons are prohibited from insuring on a joint stock. Now it appears clearly on the first view, that the provisions of the act are at an end, if a person by merely insuring in his own name can have the advantage of a joint capital, which the act meant to prohibit. This partnership therefore is contrary to the spirit of the act; and it is also contrary to the letter of it. The 12th section directs, that all societies and partnerships (except the two corporations) shall be restrained from underwriting any policy, or making any contract of assurance, and if any person acting in such society or partnership shall presume to underwrite any such policy, or make any contract of assurance, every such policy shall be void, and the sum under-

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written shall be forfeited. This does not at all go to confine the meaning of the legislature to an avowed partnership, insuring publicly in their own names; but the object is to prevent any other joint stock being embarked in insuring. This being so the consequence unavoidably is, that no contract can arise directly out of such a proceeding, so as to be the foundation of an action. The cases which have been cited were one step removed from the illegal contract itself, and did not arise immediately out of it(*a*). Thus in *Faikney v. Reynous*(*b*), the bond was given to secure the repayment by a third person, of his proportion of the money paid by the Plaintiff in stock-jobbing. So in *Petrie v. Hannay*(*c*) the money had been paid to the broker by *Keeble*, and the action was brought to reimburse his executors for the Defendant's share. In that case indeed Lord *Kenyon* seemed to be of opinion that the action could not be maintained, and it was decided expressly on the authority of *Faikney v. Reynous*(*d*). But perhaps it would have been better, if it had been decided otherwise, for when the principle of a case is doubtful, I think it better to over-rule it at once, than build upon it at all(*e*). But be that as it may, it is sufficient now to say, that those cases go one step short of the direct illegal transaction, but that the present case arises immediately out of it.

HEATH, J.(*f*) I am of the same opinion. It seems to me that the object of the statute would be totally defeated, if it were to extend only to those policies in which the names of all the partners were inserted. It expressly declares, that every policy subscribed by any person acting in a partnership shall be absolutely null and void, though it may be true that the party subscribing shall be estopped from setting up a secret partnership, to defeat a *bonâ fide* insurance. And the reason is obvious; trade is carried on according to the capital employed. Now the insurances would run to the extent of the capital, in whatever name the policy might be subscribed. The object therefore of the statute was to prevent the employment of a

(*a*) [Vide *Exparte*, Bell, 1 M. & S. 756. *Simpson v. Bloss*, 2 Marsh. 546.]

(*b*) 4 Burr. 2069.

(*c*) 3 Term Rep. B. R. 318.

(*d*) [3 Taunt. 12.]

(*e*) [The cases of *Faikney v. Reynous* and *Petrie v. Hannay* have been

repeatedly doubted. See *Webb v. Brooke*, 3 Taunt. 12. *Booth v. Hodgson*, 6 T. R. 409. *Aubert v. Maze*, 2 Bos. & Pul. 374. *Exparte Mather*, 3 Ves. 373. *Cannan v. Brycc*, 3 B. & A. 183.]

(*f*) Absent Mr. J. Buller.

joint

joint capital, which would afford the greatest competition with the established corporations. With respect to the case of *Petrie v. Hannay*, one judge there hinted that his opinion might have been different if the question had been *res integra*. But it is sufficient to rest on the opinions of the two other judges, that in the case of partners in illegal contracts, if one pays the whole partnership debt without the express consent and direction of the other, he cannot acquire a right of action against the other. So in the present case, as it does not appear that the payments were made by *Robertson* at the request or by the express direction or consent of *Tyler*, this action cannot be maintained.

ROOKE, J. As to the second point, I agree that if the contract be illegal, no action can arise out of it. But as to the first question, whether this contract were illegal or not, I must confess I had great doubts, till I heard the opinions of my Lord Chief Justice and my Brother *Heath*, and also the case cited from *Park's Insurance*, for it seemed to me that the statute only meant to prohibit insurances where both parties knew that a partnership existed, but not where there was a sleeping partnership. But I was very much struck with the observations of my Brother *Heath*, that the extent of the insurance would be in proportion to the capital employed, and if there were an increased capital, there would be an increased rivalry with the corporations. Whatever doubts therefore I had, I submit to the authority of the other judges.

Rule discharged.

TAYLOR *against* PARKINSON.

THIS was a motion to set aside a judgment entered up on a warrant of attorney, on the ground that the warrant was not read over to the party who gave it, according to a rule 14 and 15 *Geo. 2.* stated in *Imp. Pract. C. P.* 471. 4th edition.

BULLER, J, asked the prothonotary if he had ever known the rule acted upon, as it appeared to him to be a very absurd and inconvenient one, and not productive of any good consequence, for if there were fraud, it was still open to the party to apply to the court, and there was no such rule in the court of

(a) [Vide Tidd's Pr. 595. 8th Ed.]

King's

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against
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Thursday,
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It is not necessary that a warrant of attorney to confess a judgment should be read over to the party giving it (a).

1794. King's Bench. The prothonotary answered, that he never knew an instance of a judgment being set aside on that rule. Upon which the court said, that it would be proper to make the practice in this respect conformable to that of the King's Bench, and therefore that the old rule of the 14 and 15 Geo. 2. was no longer to be considered as in force.

TAYLOR
against
PARKINSON.

Rule refused.

Thursday,
Nov. 28th.

HENSCHEN *against* GARVES.

A foreign seaman having brought an action for his wages, against a foreigner, the court refused to compel him to give security for costs, on account of his being on a voyage on board an *English* ship (a).

THE Plaintiff who was a foreign seaman, having brought an action for his wages against the Defendant who was a foreign owner of a *Swedish* vessel and holden him to bail, a rule was granted to shew cause why the proceedings should not be staid, till the Plaintiff gave security for costs, on an affidavit which stated, "*That the above named Plaintiff Peter Henschen is a foreigner, and as this deponent hath heard and believes does not reside in this kingdom, but at this time is in a ship or vessel on a voyage up the Baltic Sea. And this deponent farther saith, that he verily believes the said Plaintiff hath not any goods or chattels, lands or tenements within this kingdom*" (b).

Adair, Serjt., in shewing cause, stated that it was an *English* ship on board which the Plaintiff was, and that he was under articles to return to *England*; that according to the practice of the court, the circumstance of his being a foreigner was not alone sufficient to induce the court to require such a security.

Williams, Serjt., on the other hand contended, that as the Plaintiff had withdrawn himself from the jurisdiction, and was out of the reach of the process of the court, he ought not to be permitted to harass the Defendant with an action, unless he gave a security to pay the costs in case he did not succeed. But

The Lord Chief Justice and *Heath*, J. (c), held that it would be highly impolitic in the present state of public affairs, when men were wanted in the navy, to throw difficulties in the way of a foreign sailor recovering his wages in our courts, who was serving on board an *English* ship, and who if he were compelled to give security, would probably not be able to recover them at all, and therefore that the security ought not to be required.

(a) [Vide ante, 118 note (1).]
(c) Absent *Buller*, J.

(b) This is an exact copy of the affidavit.

But

But ROOKE, J., was of opinion, that as the Plaintiff was a foregner, not domiciled in *England*, and out of the jurisdiction of the Court, the circumstance of his being on board an *English* ship was not a sufficient reason to exempt him from giving the security.

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against
GARVES.

Rule discharged (a).

(a) Vide *ante*, 118. *Ganesford v. Levy*, and vol. 1. 106, *Parquot v. Eling*, and *Porrier v. Carter*, from which it will appear, that the decisions of the court respecting the Plaintiff giving security for costs, which have taken place since the commencement of these Reports, have not been altogether uniform. But the practice seems now to be, that the fact of the Plaintiff being a foregner, or being

resident abroad, is of itself a ground upon which a rule to shew cause will be granted, but that such rule will not be made absolute, unless some special circumstances appear to induce the court to order the security: and if the rule be made absolute, that it will be on condition of the Defendant making such reasonable admissions as may be required.

END OF MICHAELMAS TERM.

IN

IN the vacation after *Easter* term, Mr. Justice *Lawrence* resigned his seat in this court, and was appointed one of the Judges of the Court of King's Bench, in the room of Mr. Justice *Buller*, who succeeded him in this Court.

IN *Trinity* term *Samuel Heywood*, Esq., and *John Williams*, Esq., both of the *Inner Temple*, were called to the honourable degree of Serjeants at Law.

C A S E S

ARGUED AND DETERMINED

1795.

IN THE

Courts of COMMON PLEAS

AND

EXCHEQUER CHAMBER,

IN

Hilary Term,

In the Thirty-fifth Year of the Reign of GEORGE III.

CULLEY *against* SPEARMAN.

Wednesday,
Feb. 4th.

REPLEVIN for taking cattle. Avowry, that *John Addison* was seised in fee of *seven undivided eighth parts* of the *locus in quo*, and demised the *said seven undivided eighth parts* to the Defendant, who took the cattle damage-feasant, &c.

One tenant in common cannot avow *alone* for taking cattle damage-feasant, but he ought also to make cognizance as bailiff of his companion (a).

To which there was a special demurrer, shewing for causes,
“ That the Defendant hath not set forth or disclosed in or by
“ that avowry, who is seised in fee of the other undivided
“ eighth part of the said place, in which, &c. nor shewn nor
“ deduced any title to the same, nor hath avowed under any
“ title deduced to himself of that eighth part of the said place,
“ in which, &c. nor made cognizance under any person seised or
“ possessed of such eighth part as tenant in common with him-
“ self as he ought to have done, and for that, he hath avowed
“ the said taking of the said cattle in his own right only,
“ whereas he ought also to have made cognizance as bailiff of

(a) [But in an avowry for rent, which is a demand in the realty, tenants in common must avow for

their separate portions, *Harrison v. Barnby*, 5 T. R. 249.]

“ the

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“ the person or persons seised or possessed of the said other
“ undivided eighth part of the said place, in which, &c.”

Le Blanc, Serjt., in support of the demurrer. It is a clear rule of law, that tenants in common must all join in actions concerning the personalty. *Co. Lit.* 198 *a*. Now an avowry stating that the cattle were taken damage-feasant, is in the nature of a declaration in trespass for the injury done, and within the principle of the rule: the avowant is quasi Plaintiff, and is intitled to damages, if the verdict be in his favour. There may be several avowries for rent, because that is in the realty, but not for damage-feasance, which is in the personalty. In 1 *Roll. Abr.* 220. *pl.* 14. it is said, that a tenant in common cannot avow the taking of cattle damage-feasant without making himself bailiff or servant of his companion, and the same point is laid down, *Sir W. Jones*, 253. *Theol. Dig.* 27.

Clayton, Serjt., *contra*. The case in *Sir W. Jones* is the same as is stated in 1 *Roll. Abr.* 220. viz. *Lamshead v. Leate*, and is also to be found in 3 *Vin. Abr.* 388. But it is directly contradicted by that of *Willis v. Fletcher*, *Cro. Eliz.* 530. It by no means follows, that tenants in common must join in an avowry for an injury to the land, because they must do so in a personal action. They are several in every point except in their possession, and are like commoners who, though they have an unity of possession, may yet make several avowries for an injury to the common. 1 *Roll. Abr.* 405. *pl.* 5. 9 *Co.* 112 *b*. *Yelv.* 129. 4 *Burr.* 2426. Tenants in common must make separate demises in ejectment, *Show.* 342. *Moore v. Fursden*, 2 *Wils.* 232. *Heatherley v. Weston*. So because the freehold is several, one may enfeoff, but cannot release to the other, whereas, where the freehold is joint as between joint-tenants, one may release to, but cannot enfeoff the other, *Co. Lit.* 200 *b*. It is not a necessary consequence, that because they must join in an action, they must do the same in an avowry. If they lease their tenements to another, they must join in an action of debt for the rent, but must make several avowries for it, *Co. Lit.* 198 *b*. In *Ward v. Everard*, *Carth.* 340. 1 *Salk.* 389. 1 *Lord Raym.* 422., it was admitted, that tenants in common, grantees of a rent charge, could not be joined in a cognizance for the rent; it is objected, that one ought to shew himself bailiff to the other. But whether bailiff or not is traversable, *Bull. N. P.* 55. and suppose one should be hostile to the other, conspire with the owner
of

of the cattle, and not consent to his companion being his bailiff, the other could not prove himself bailiff, and then what remedy could he have, if he could not avow alone?

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BULLER, J. (a). My Brother *Clayton* has made more of his part of the argument than I thought could have been made of it: but the authorities on the other side are too strong to be got over. Of the two contradictory cases, the one in *Cro. Eliz.* and the other in Sir *W. Jones*, there cannot be a doubt which ought to prevail. That in *Cro. Eliz.* was decided quite on a different point: but there, the two judges, who were of contrary opinions to *Walmsley*, held expressly, that an avowry was in the nature of an action. If so, there is an end of the question, for it is admitted that in an action of trespass and other actions which concern the personalty, all the tenants in common must join. In the case cited by my Brother *Le Blanc* in Sir *W. Jones*, all the court held, that they must join in an avowry for damage-feasant, and as that was the very point on which it turned, and as it is of a much later date than the case in *Cro. Eliz.* we must be bound by it. But independent of authorities, let us see how my Brother *Clayton's* reasoning will bear him out: he says, the interests of tenants in common are several in every respect, except what regards their possession; but by that, he admits the whole argument on the other side; this case arises from an injury to the possession, and the taking cattle damage-feasant is taking a pledge for satisfaction for that injury. Then he compares this to the case of commoners, who may bring several actions for disturbing their right of common, but that instance is not applicable to the present case. Commoners have not one estate, but each has a different estate within the manor; and the property of the waste, on which they have common, is in the lord. An injury therefore to their several rights of common, is totally different from an injury to the land, in which tenants in common have but one estate. As to the supposed hardship, if two tenants in common were hostile to each other, and the one were obliged to avow as bailiff of the other, without obtaining the other's consent that it is incident to the nature of the estate; if he dislikes his situation, he may put an end to the tenancy by a writ of partition. With respect to the case of *Ward v. Everard*, there the rent was expressly granted to be paid in several portions to the grantees who had several titles,

(a) Absent the Lord Chief Justice.

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against
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and each a power of distress reserved in the deed. That case, therefore, does not contradict the rule, that in an avowry concerning the personalty, all the tenants in common must join.

HEATH, J., of the same opinion. It is a matter of necessity, and for the sake of justice, that both the tenants in common should join, for if one were to distrain without the other, as there could not be a double satisfaction for the same injury, the other would have no remedy.

ROOKE, J., of the same opinion. I think the authority of the case cited from Sir W. Jones outweighs that in *Cro. Eliz.* Tenants in common have been improperly, in the argument, compared to commoners, who are so called, not from any community of interest between themselves, but because they have a right to pasture on the waste in common with the lord.

Judgment for the Plaintiff.

But leave was given to amend.

Wednesday,
Feb. 4th.

TERRY and Another *against* DUNTZE, Bart.

A. covenants to build a house for *B.* and finish it on or before a certain day, in consideration of a sum of money, which *B.* covenants to pay *A.* by instalments as the building shall proceed.

The finishing the house is not a condition precedent to the paying the money, but the covenants are independent.

A. therefore, may maintain an action of debt against *B.* for the whole sum, though the building be not finished at the time appointed (*a*).

THIS was an action of debt, and the declaration stated, that by certain articles of agreement made on the 25th of March 1789, between Sir George Yonge, Bart. the said Sir John Duntze (the Defendant) one Henry Reed, and one Thomas Southcomb, and the Plaintiffs, the said Plaintiffs in consideration of the sum of 3800*l.* to be paid as hereinafter mentioned, did jointly and severally covenant with the said Sir George Yonge, Sir John Duntze, Henry Reed, and Thomas Southcomb, and each of them, that the said Plaintiffs or one of them would at their own proper costs and charges finding all materials whatsoever, and with the best materials of every kind, and in a good substantial and workmanlike manner, build, erect, and finish a certain building for a manufactory at Ottery Saint Mary, in the County of Devon, according to certain drawings and plans, and would erect the said building according to such rules, and in such manner as by the particulars thereof thereunder written were mentioned and specified; and also that

(*a*) [Vide *Heard v. Wadham*, 1 East, 631. *Duke of St. Alban's v. Shore*, *antè*, vol. i. p. 270.]

the

the said building, including the wheat case, to be adjoining or within the same, should be in every respect *finished and completed, on or before the 29th day of September then next.* In consideration whereof they the said Sir George Yonge, Sir John Duntze, Henry Reed and Thomas Southcomb, covenanted to pay the 3800*l.* in the following manner, that is to say, the sum of 1266*l.* 13*s.* 4*d.* as soon as the *second floor should be laid*, the further sum of 1266*l.* 13*s.* 4*d.* as soon as the *fourth floor should be laid*, and the remaining sum of 1266*l.* 13*s.* 4*d.* as soon as the *whole building should be covered in*, and fully finished and completed, and the same building should be surveyed and approved of by such persons as should be by the said Sir George Yonge, Sir John Duntze, Henry Reed and Thomas Southcomb, or either of them, appointed to examine the same for that purpose, within one month after the same should be so as aforesaid finished and completed. And the said Sir George Yonge, Sir John Duntze, Henry Reed and Thomas Southcomb, did, and each of them did also agree, to advance and pay unto the workmen and labourers employed by the said Plaintiffs in erecting the said building, such sum or sums of money weekly as might be necessary for their weekly wages or subsistence, the same to be deducted and allowed out of the instalment, portion or share of the said 3800*l.* which should be by them next paid, according to the covenant and agreement aforesaid, relating thereto; and also to pay unto the said Plaintiffs at the time of paying the last of the three several sums of 1266*l.* 13*s.* 4*d.* in manner hereinbefore mentioned, the further sum of 150*l.* for freight and carriage of materials, travelling expences for workmen and labourers, and all other incidental charges, not included in the particulars thereunder written; provided always, and it was thereby also agreed between the said parties thereto, and each and every of them jointly and severally, that if the foundation should not prove good, so as that it should be necessary to put in sleepers or a greater depth of brick-work than was described in the plans annexed, and the particular thereunder written, then the said Plaintiffs should be paid in addition to the several sums above mentioned as extraordinary work, but in a reasonable proportion, according to the extent of such extraordinary work, provided also, that neither such extraordinary work, nor any other variation which might be agreed on in the course of the carrying on the building, should make void that agreement, but

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the same should be binding and valid, notwithstanding such variation or extraordinary work as aforesaid, and the same should be allowed for or *deducted, at a proportionable estimate to the whole of the contract money, &c. It was then averred that the Plaintiffs after making the articles and before exhibiting their bill did at their own proper costs and charges, finding all materials whatsoever, and with the best materials of every kind, and in a good, substantial and workmanlike manner, build, erect and finish the said building, in the said articles of agreement mentioned, and so thereby agreed to be erected and built, for a manufactory as aforesaid, together with such wheat case as aforesaid, according to the said drawings, sections and plans delineated in the two several papers thereto annexed as aforesaid, and also according to such rules and in such manner as by the particular thereof thereunder written, were and are mentioned and specified as aforesaid, except as is hereinafter mentioned; *and that the said building including such wheat case aforesaid, would have been in every respect finished and completed by them the said Plaintiffs, on or before the twenty-ninth day of September next, after the making of the said articles of agreement, according to the tenor and effect of the said articles, but the said Plaintiffs further said, that in erecting and building the said manufactory and wheat case, they the said Plaintiffs by the direction, and at the special instance and request of the said Sir George Yonge, Sir John Duntze, Henry Reed and Thomas Southcomb, made and caused to be made divers alterations and variations therein, and in many respects deviated from the said drawings, sections, plans, particulars and rules, in the said articles of agreement mentioned, and were thereby, and in consequence thereof, and without any neglect or default of the said Plaintiffs not only hindered and prevented from finishing and completing the same, upon or before the said twenty-ninth day of September next after the making of the said articles of agreement, but also forced and obliged to do and perform certain extraordinary work, in and about the said building and wheat case, over and besides what was originally designed and stipulated for as aforesaid(a). It was then averred that a surveyor was appointed who surveyed and approved of the building and the extraordinary work, &c. and that the Plaintiffs reasonably de-*

(a) [Vide *Pepper v. Burland*, Peake's N. P. C. 103. *Robson v. Godfrey*, Holt's N. P. C. 236.]

served

served to have the sum of 7059*l.* 1*s.* 9½*d.* exclusive of the sum of 150*l.* as a farther allowance for divers expences not included in the particular written under the articles of agreement, according to the estimate of the surveyor, &c. and the breach assigned was the non-payment of any of the sums of money in the articles of agreement specified, &c.

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There were also counts for work and labour, money paid, and on an account stated. [392]

To the first count there was a general demurrer, and to the others *nil debet* was pleaded.

In support of the demurrer, *Le Blanc*, Serjt., argued, that as the Plaintiffs had positively agreed to complete the buildings on or before the 29th of *September*, it was necessary to shew that they were completed on or before that day. The excuse which is alleged, namely, that they made alterations deviating from the plan, by the direction of the Defendant, and were therefore prevented from finishing the buildings within the time, is not tantamount to a performance. The original undertaking was by deed, and cannot be dispensed with by the simple agreement of the parties. Thus if a bond be conditioned to perform an award, provided the arbitrator make his award on or before a certain day, and afterwards both parties agree that the time shall be enlarged, yet unless the award be made within the time mentioned in the condition, the bond is void. *Brown v. Goodman*, 3 *Term Rep. B. R.* 592. *in notis.* *Little v. Holland*, *ibid.* 590.

The counsel on the other side was stopped by

BULLER, J.(a) The only question in this case is, whether the covenants were dependent, and whether the completing the buildings was a precedent condition. Now it is a rule long established in the construction of covenants, that if any money is to be paid before the thing is done, the covenants are mutual and independent. It is accordingly laid down by Lord Holt in *Thorpe v. Thorpe*(b), that “if a day be appointed for payment of the money, and the day is to happen before the thing can be performed, an action may be brought for the money before the thing be done: for it appears the party relied upon his remedy; and intended not to make the performance a condition precedent”; and he cites the Year Book, 48 *Ed.* 3.

(a) Absent the Lord Ch. J.

(b) 1 Salk. 170. 1 Lord Raym. 662.

Comyn's Rep. 98., and more at length 12 Mod. 455.

1795. 2, 3. 7 Co. 10 b. *Ughtred's* case. 1 *Ventr.* 147. and 1 *Sand.* 319.

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The case in the Year Book, 48 *Ed.* 3. 2, 3. is inaccurately stated by Lord *Coke* in *Ughtred's* case, to be “ that Sir *Ralph Tolcelser* covenanted with Sir *Richard Pool* to serve him with “ three esquires of arms in the war with *France*, and Sir *Richard* covenanted *therefore to pay* him forty-two marks, and “ that each party had equal remedy, one for the service, and “ the other for the money.” But it appears in the Year Book, that the covenant was that half the money was to be paid in *England* before they went to *France*: the principle therefore of that case agrees with the doctrine of Lord *Holt* in *Thorpe v. Thorpe*, as is observed by him 12 *Mod.* 461. So also in *Pordage v. Cole*, 1 *Saund.* 319, where there was an agreement by the Defendant to give a certain sum to the Plaintiff for his lands and house, &c. to be paid at a fixed period, and only five shillings of the purchase-money was advanced at the time of making the agreement, an action on the agreement was holden to lie for the residue amounting to 774*l.* 15*s.* without shewing that he had either made or tendered a conveyance of the lands. Now let us apply this principle to the present case. The Plaintiffs covenant to finish and complete the buildings on or before the 29th of *September* then next; in consideration of which the Defendant covenants to pay 3800*l.* by instalments, *viz.* a certain sum when the second floor should be laid, a further sum when the fourth floor should be laid, and the remainder of the money when the whole should be covered in and finished. By the terms of the contract then two several sums of money were to be paid, before the thing to be done was done. The Plaintiffs therefore were clearly intitled to their action for the money without averring performance, and the Defendant to his remedy on the covenants.

HEATH, J., of the same opinion.

ROOKE, J., of the same opinion.

Judgment for the Plaintiff.

1795.

FITCH *against* RAWLING, FITCH and CHATTERIS.

THIS was an action of trespass for breaking and entering the Plaintiff's close at *Steeple Bumstead* in *Essex*, and playing there, with divers other persons to the Plaintiff unknown, at a certain game called *cricket*, and other games, sports, and pastimes, and in so doing, &c.

Pleas. 1st. Not guilty by all the Defendants. 2d. By *Chatteris*, "That there now is and from time whereof, &c. hath been a certain antient and laudable custom used and approved of in *the said parish, that is to say, that *all the inhabitants* for the time being of the parish aforesaid, have during all the time aforesaid, used and been accustomed to have, and of right ought to have had, and still of right ought to have the liberty and privilege of exercising and playing at all kinds of lawful games, sports and pastimes, in and upon the said close in which, &c. every year, at all *seasonable* times of the year at their free will and pleasure"; he then averred, that at the several times when, &c. he was an *inhabitant* of the said parish, and at those times, being seasonable times, he entered the *locus in quo*, and played at *cricket*, &c. The third plea, by *Rawling* and *Fitch*, stated the custom to be for "all persons for the time being, being in the said parish, to have the liberty and privilege of exercising and playing at all kinds of lawful games, sports and pastimes, in and upon the *locus in quo* at all *seasonable* times, &c." and justified under that custom.

The replication to each plea traversed the customs alleged, and on the traverses issues were joined, and a verdict found for the Defendants. And now *Le Blanc*, Serjt., shewed cause against a rule to arrest judgment (b). There is no good objection to the customs stated on this record, and therefore no ground for arresting the judgment. It is laid down in *Gateward's* case, 6 Co. 59 b. that though a custom for the inhabit-

Wednesday,
Feb. 4th.

A custom for "all the inhabitants of a parish to play at all kinds of lawful games, sports and pastimes (a) in the close of A. at all seasonable times of the year, at their free will and pleasure", is good. But a similar custom, "for all persons for the time being, being in the said parish", is bad.

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(a) [But see *Millechamp v. Johnson*, Willes, 205 (n.) where the Court were of opinion, that a similar custom extending to *any rural* sports was too general and uncertain. See also *Bell v. Wardell*, Willes, 202. and *Steel v. Houghton*, ante, vol. 1. p. 51. *Rex v. Ecclesfield*, 1 B. & A. 360.]

(b) When the rule was moved for, Mr. Justice Buller observed that as

there was a verdict for the Defendants on the whole record, it was useless to move in arrest of judgement, for as it appeared that they had not committed the trespasses complained of, it was immaterial what became of the special issues. The postea therefore was amended by entering a verdict for the Plaintiff on the general issue, and for the Defendants on the others.

ants

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against
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ants of a place, as such, to take an interest or profit in the soil of another is bad, yet a custom for them to have an easement in another's soil is good. In *Abbot v. Weekly*, 1 *Lev.* 176. a custom for the inhabitants of the vill to dance in the Plaintiff's close for their recreation, was holden to be a good one. Here the case is stronger than that of *Abbot v. Weekly*, the custom being alleged to be, to play at lawful games and sports at all *seasonable* times. As to the custom in the second plea, there is no material difference between the inhabitants and persons being in the parish. The claim of both is merely for an easement, and there seems to be no more ground to object to all persons being in the parish enjoying the easement, than to all the king's subjects passing over a highway, in the soil of another.

[395] *Bond* and *Heywood*, Serjts., in favour of the rule. Neither of the customs stated on this record can be supported. With respect to the first, a custom for *all the inhabitants* of a parish to have the liberty of exercising and playing at all kinds of lawful games at seasonable times of the year, at their free will and pleasure, is bad. There is great uncertainty in the description of inhabitants; it includes all servants, visitors, women and children: it depends neither on time nor estate: their interest is transitory, and not in general noticed by the law. There is a jealousy therefore entertained by the law, of the inhabitants of particular districts claiming rights in the soil of others. They cannot claim by prescription, but only by custom. But when they claim by custom that for which others prescribe, which is allowed from the necessity of the thing, the legality of the custom is to be examined by the same rules as if it were a prescription. *Hob.* 86. *Day v. Savage*, 1 *Ventr.* 383. *Potter v. North*. Now it is clear, that nothing can be prescribed for which is not the subject of a grant, a prescription supposing an original grant. But a grant to all the inhabitants of a place would be bad for its uncertainty. They cannot claim a profit *à prendre* in the soil of another, but are restrained to matters of discharge in their own, as from toll. 3 *Mod.* 290. *Pain v. Patrick*, from tithes, *Cro. Jac.* 152. or to matters of easement in that of another. The matters of easement which they may claim, are to be classed under two heads, such as are necessary for the enjoyment of their own estates, and such as are for the public good. Instances of the first kind are

customs

customs to water cattle at a certain watering place, to turn a plough in another's land, 3 *Mod.* 293. to use a way to a church or market, *Cro. Jac.* 152. *Cro. Car.* 419. or to a well or spring, 15 *Ed.* 4. 29. and the like. Of the second kind are customs to perambulate a parish, *Cro. Eliz.* 441; to erect a stall in a market, 3 *Mod.* 292, for fishermen to dry their nets, *Cro. Car.* 419, and the like. The custom stated in the second plea, if it can be supported, falls within the latter class. But in order to make it good, it ought to have shewn that the games were for the recreation and health of the inhabitants, and that *Chatteris* played for his recreation, on which ground the custom in *Abbot v. Weekly* was holden to be good; it is not sufficient that they were merely for pleasure. This plea is also bad, as not being an answer to the trespass laid in the declaration, which is "that the Defendants broke and entered and remained in the Plaintiff's close, and there played together with divers other persons to the Plaintiff unknown, at a certain game called "cricket." The Defendant, *Chatteris*, justifies this by saying, that the inhabitants by custom have a right to play there, and therefore he as one of them played there. It appears therefore on the record, that he played with the other defendants who were not inhabitants, and with other persons. To *them* this justification cannot be applied: they were trespassers, but what they did together was one act, 2 *Roll. Rep.* 224. *Storey v. Rice*, and if they were trespassers he was one too, for he aided and assisted them. If he be supposed to have been there by licence of law, he became a trespasser *ab initio*, by abusing that licence.

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With respect to the third plea, the custom there stated is also bad, it being for *all persons* being in the parish, that is for all persons in the world, who may choose to come into the parish. This is void for its generality. If there be such a right, it is by the common law, and not by custom. *Co. Litt.* 110 *b.* So a right for all the men of *Kent* to make trenches and bulwarks on the coast against an enemy, is by the common law, and not by custom. *Bro. Abr. tit. Customs, pl.* 45. So for all the fishermen of *Kent* to go on the land of another to fish. *Ibid.* 46. So for all executors to be sued by action of debt in the mayor's court of *London*, *Fitzgibb.* 51. If there be such a right for all persons, any one might bring an action for an obstruction of it, *Co. Litt.* 56 *a.* *Westbury v. Powell*. But surely
 it

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it will not be contended that such an action could be maintained, independent of property or inhabitancy. The right claimed resembles a right for all the king's subjects to pass and repass over a public highway, but no action could be maintained for obstructing the highway, without special damage.

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But be these customs good or bad, the Plaintiff is intitled to judgment, or at least there must be a *venire de novo*. On the same record the jury have found that two *contradictory* customs exist in the same place. Admitting that Defendants may sever in their pleas, and plead inconsistent matters, the jury cannot find such inconsistent matters, because they cannot exist in fact. The larger custom in this case cannot prove the smaller, because the larger is void in law, and because the *persons* are different who are to enjoy the benefit claimed. Thus a custom for a copyholder to have common as belonging to his customary tenement, is not supported by evidence of a custom extending to *all* the tenants. *Brook v. Smith, MSS. of Perrott, Baron (a)*. So a prescription for a general right of common for 100 sheep, is not proved by shewing such right for 120 sheep. *Cro. Eliz. 722*, though a prescription for a general right of common will prove a prescription for any particular sort of common, *Bull. N. P. 59*. and though a prescription for 100 sheep is supported by evidence for 100 sheep and 6 cows, *Cro. Eliz. 722*.

Le Blanc, Serjt., who was going to reply, was prevented by the Court.

BULLER, J. (*b*) Some nice and critical objections have been made to the pleadings in this case, which I shall first consider. It is said that the plea of the Defendant *Chatteris* does not answer the complaint laid in the declaration, which is, that all the Defendants together with divers other persons unknown to the Plaintiff, played at cricket in the Plaintiff's close, but that the plea alleges the custom to be for the inhabitants of the parish to play at cricket there, and that *Chatteris* as an inhabitant so played, that is, says my Brother *Heywood*, that he played there with other persons who were not inhabitants, and who were therefore trespassers, and that he himself by aiding them in their trespass, was guilty of an abuse of a licence in law, and

(*a*) This case is mentioned in the MSS. of Mr. Baron *Perrott*, as having been tried at *Nisi Prius*, before *Carter*, Serjt., Judge of Assize, 1726, who

ruled the point, which was acquiesced in by the Bar.

(*b*) Absent the Lord Chief Justice.

therefore

therefore a trespasser *ab initio*. But this objection, supposing it to be a good one, does not arise on the face of the plea, and if the Plaintiff would have availed himself of it, he ought to have set it out by way of replication. It cannot prevail on a motion in arrest of judgment, for admitting it to have more weight than I think it has, after verdict, it is cured by the statutes of *Jeofails*.

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Another objection made is, that the customs, whether good or bad, are repugnant to each other, and therefore that the Court cannot give judgment on either of the special pleas, though found for the Defendants. But it would be very strange if one Defendant should plead a good plea, and it were found for him, that he should not have judgment, according to the justice and truth of the case, though the other Defendant should plead a bad plea. But why are these customs inconsistent with each other? It might happen, that there might be at first a limited custom, and afterwards a more extensive one, and I do not see why the second should root up the first, or why they might not both exist together, supposing the second to be a good one.

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But the real question is, whether the customs as stated are good. It is objected to the first custom, that it is not alleged to be for the necessary recreation of the inhabitants, nor that the Defendant *Chatteris* went into the close in question for his recreation. But in the case in *Levinz*, the Court say that it is necessary for the inhabitants to have their recreation. If so, it is a matter of law, and though there may be precedents which state such customs to be for either the health or recreation of the inhabitants, yet when the Court lay it down that recreation is necessary, it is not necessary to be averred in pleading. As to the objection, that it is not stated that the Defendant *Chatteris* went into the *locus in quo* for his recreation, the words of the plea are, that “he entered into the said close in which, &c. “for the purpose of exercising and playing at divers lawful “games, sports and pastimes, and at those several times respectively there played at the said game of *cricket*, and the “said other games, sports and pastimes, &c.” Now what are sports and pastimes but recreations? With respect to the case in *Bro. Abr. Custom*, pl. 46, there the custom was holden to be bad, not because it was for the fishermen of *Kent* to dry their nets on the Plaintiff’s land, (which the case in *Cro. Car.* shews to

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to be good,) but either because the digging in the soil, in order to pitch stakes to hang the nets upon, was unnecessary, or it tended to the destruction of the inheritance. But that is not the case here. There is no authority therefore to oppose the case in *Levinz*; and upon the whole I think that this custom is reasonable, and the plea good.

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But I hold the other custom to be as clearly bad, as the first is good. How that which may be claimed by all the inhabitants of *England* can be the subject of a custom, I cannot conceive. Customs must in their nature be confined to individuals of a particular description, and what is common to all mankind, can never be claimed as a custom. And I perfectly agree, that no action could be maintained for interruption of it, any more than in the instance put by my Brother *Bond* of a highway. There must be therefore judgment for the Defendant *Chatteris* on the first special plea, and for the Plaintiff against the other two Defendants.

HEATH, J. I am of the same opinion. The lord might have granted such a privilege, as is claimed by the first custom, before the time of memory. As to the second, it is clearly bad, being for all mankind, and on that the case in *Fitzgibbon*, 51. is in point.

ROOKE, J. There seems to me no objection to the first custom, and no ground for the second.

Monday,
Feb. 9th.

DOE, on the Demise of CLARKE, against CLARKE and Others.

Lands, &c.
are devised
to B. for
life, and
after his de-
cease to all
and every
such child or
children of
B. as shall
be living at
the time of
his decease:

a posthumous child of B. shall share equally with those who were born in his lifetime. An infant *en ventre sa mere* is considered as born, for all purposes which are for his benefit (a).

(a) [Vide *Long & Blackall*, 7 T. R. 100. *Whitclock v. Heddon*, 1 Bos. & Pul. 243. *Fearne*, Cont. Rem. 309. 6th edit. Bull. N. P. 105.]

when

when a verdict was found for the Plaintiff, subject to the opinion of the Court on the following case, viz.

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William Pearce Clarke being seised in fee of the rectories, &c. in the declaration mentioned, by his will dated the 27th of *February* 1782, devised amongst other things “all that his rectory or rectories impropriate, parsonage or parsonages of the church and churches of *Tunstead* and *Sco Ruston*, in the county of *Norfolk*, and all tithes, tenths, oblations, obventions, profits, emoluments and commodities whatsoever to the same belonging or appertaining, and also all his messuages, buildings, glebe lands, tenements, and hereditaments whatsoever, to the said rectory or rectories belonging or appertaining, with their and every of their appurtenances, and also all that his advowson, donation, right of patronage, and presentation of the vicarage of the church and churches of *Tunstead* and *Sco Ruston*, with the rights, members and appurtenances thereunto belonging, to his brother *Henry Clarke*, and his assigns, for and during the term of *his natural life*, and from and after the decease of his said brother *Henry Clarke*, to the use and behoof of *all and every such child or children* whether male or female, of his said brother *Henry Clarke*, as should be living at the time of his decease, (other than and except *Bridget* his the testator’s niece,) as tenants in common, and not as joint-tenants, and of the several and respective heirs and assigns of such child or children for ever.” The testator *William Pearce Clarke* died on the first of *May* 1782, without altering or revoking his will, leaving his said brother *Henry Clarke* surviving, who died on the 21st of *October* 1782, leaving *Elizabeth Clarke*, his widow, *Bridget* his daughter by his first wife, and *Elizabeth*, *Mary* and *Judith*, his three daughters by the said *Elizabeth* his second wife, which said three daughters are the above named Defendants; and also leaving his said wife *Elizabeth* pregnant at the time of his death, who was delivered of a daughter *Harriet Clarke* on the 23d of *May* 1783; which said *Harriet Clarke* was the lessor of the Plaintiff; and was actually ousted by the Defendants before the action was brought.

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Le Blanc, Serjt., was going to argue on behalf of the lessor of the Plaintiff, when the Court said they wished to hear the other side. Accordingly

Bond, Serjt., on the part of the Defendants, stated the question

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tion to be, whether an infant *en ventre sa mere* at the time of the decease of the father could be considered as a child *living* at his decease? Unless the will expresses the contrary, a devise to such children of *A.* who are living at the time of his decease, means to such as are born at that time. 1 *Vesey*, 111. *Ellison v. Airey*, *Hales v. Hales* there cited, 2 *Brown Chan. Cas.* 38. *Pierson v. Garnet*, *id.* 63. *Cooper v. Forbes*.

Lord Chief Justice EYRE. I have no doubt on any view of this case. It is plain on the words of the will, that the testator meant that all the children whom his brother should leave behind him should be benefited: but independent of this intention, I hold that an infant *en ventre sa mere*, who by the course and order of nature is then living, comes clearly within the description of "children living at the time of his decease."

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BULLER, J. In equity, there are two classes of cases on this subject, the first, where the bequest is in the nature of a portion or provision for children, and there an after-born child takes his share with the rest, of which class is the case of *Millar v. Turner*, 1 *Vesey*, 85: the second, where the bequest arises from some motives of personal affection, and there it is confined to children actually in existence. Of this second class was the case of *Cooper v. Forbes*, which therefore makes a striking difference between that case and the present. Here the bequest is not confined to children living at the death of the testator, but is kept open till the death of his brother. It seems indeed now settled, that an infant *en ventre sa mere* shall be considered, generally speaking, as born for all purposes for his own benefit, *Lancashire v. Lancashire*, 5 *Term Rep. B. R.* 49. And in a sensible treatise lately published, *Watkins's Law of Descents*, 142. after a discussion of the interest of posthumous issue, the whole is well summed up by saying, "It is now laid down as a fixed principle, that wherever such consideration would be for his benefit, a child *en ventre sa mere* shall be considered as absolutely born."

HEATH, J., of the same opinion.

ROOKE, J., of the same opinion.

Lord Chief Justice EYRE. The two classes of cases in equity proceed on a distinction which has always appeared to me extremely unsatisfactory, and unfit to be the ground of any decision whatever.

Postea to the Plaintiff.

THOMAS

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Wednesday,
Feb. 11th.

THOMAS PHILLIPS, NATHANIEL JOHN PHILLIPS, ROBERT PHILLIPS, and WILLIAM CRAMMOND, *against* HUNTER and Others, Assignees of BLANCHARD and LEWIS, Bankrupts, in the Exchequer Chamber, in Error.

THIS was an action for money had and received, brought by the Defendants against the Plaintiffs in error in the Court of King's Bench, in which a special verdict was found at *Guildhall*, stating, "that before the bankruptcy of *Blanchard and Lewis, Phillips and Co.* had sold and delivered a large quantity of goods to them, at 12 months credit: that the debt was contracted in *England*, and that the Defendants in error as well as the bankrupts before and at the time of the bankruptcy, and at the time the said debt was so contracted, were resident in *England*, and continued to reside in *England* long after the debt was contracted, and until the attachments hereinafter mentioned were issued in the Court of Common Pleas in *Philadelphia*, in the Commonwealth of *Pennsylvania*, in *North America*: that the Plaintiffs in error before and at the time of the bankruptcy, and at the time when the debt was so contracted, were traders and copartners and carried on trade and commerce at *Manchester*, in the county of *Lancaster*; that the *Phillipses* during all the time last aforesaid were resident in *England*, and continued to reside in *England* long after the said debt was so contracted, and until the attachments hereinafter mentioned were issued, but the other Plaintiff in error, *William Crammond*, before the year 1784, and before the bankruptcy, went from *England* to *America* for the purpose of transacting in that country the commercial concerns of the house of *Phillips and Co.* so carrying on trade and commerce at *Manchester* as aforesaid, and remained and continued in *America* till after the issuing of the attachments hereinafter mentioned: that *William Crammond* on the 23d of October, 1783, knowing that *Blanchard and Lewis* had stopped payment in the month * of August preceding, and after the said commission of bankrupt had issued against them, commenced an action for himself and partners against *A. B. and C.* being partners in trade in *England*, *A. and B.* reside in *England*, and *C.* goes to a foreign country for the purpose of managing the concerns of the house in that country. *D.* is also resident in *England*, where a debt is contracted by *D.* to *A. B. and C.* *D.* becomes insolvent, and *C.* knowing that *D.* has stopped payment, and after a commission of bankrupt has in fact issued against *D.* attaches in the names of himself and his partners, a debt due to *D.* in the foreign country by legal process, and obtains payment of it under the judgment of a court of justice of that country. The assignees of *D.* have a right to recover the money so received by *C.* in an action against *A. B. and C.* for money had and received to the use of the assignees.

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the bankrupts in *England*, in the Court of Common Pleas, in *Philadelphia*, in the Commonwealth of *Pennsylvania*, in *North America*, according to the laws and customs of the said Commonwealth, for the recovery of the money due for divers of the said parcels of goods so sold and delivered to the bankrupts; and thereupon, on the said 23d of *October*, 1784, being after the provisional assignment of the said bankrupts' effects caused to be attached by the process of the same court as the goods and chattels of the said bankrupts in the hands and possession of *Duncan Ingraham* the younger, of *Philadelphia* aforesaid, merchant, *Stephen Austin* of the same place, merchant, and *John Blanchard* and *Thomas Russell* of the same place, merchants, certain monies which before *Blanchard* and *Lewis* became bankrupts, were due to them from the said *Duncan Ingraham* the younger, *Stephen Austin*, *John Blanchard*, and *Thomas Russell*, and which at the time of the said attachment remained unpaid, and did afterwards in the said Court of Common Pleas so holden as aforesaid, on the 1st of *June* 1786, according to the laws and customs of the said Commonwealth, recover judgment against the said *Blanchard* and *Lewis* for the said debt and damages demanded in the said action, the sum of 2639*l.* 18*s.* 3*d.* current money of the said Commonwealth of *Pennsylvania*, being 1403*l.* 0*s.* 6*d.* of sterling money of *Great Britain*, and also costs of suit taxed at 19*l.* 2*s.* of like current money of the said Commonwealth; that the said *William Crammond* did, by virtue of, and under such attachment and judgment as aforesaid, obtain and receive payment from the said *Duncan Ingraham* the younger, and *Stephen Austin*, of the sum of 1403*l.* 0*s.* 6*d.* of lawful money of *Great Britain*, in full, for the damages recovered by *Phillips* and Co. under the said judgment from the said monies in the hands of the said *Duncan Ingraham* the younger, and *Stephen Austin*, together with such costs and suit as being part of the monies and effects of the said *Blanchard* and *Lewis* within the said Commonwealth: it was then stated, that *Crammond* had recovered a further sum of 23*l.* 9*s.* 9*d.* in *Philadelphia*, by a similar process against *Ingraham* and *Austin*, for the residue of the goods sold and delivered to *Blanchard* and *Lewis*, and that the two sums of 1403*l.* 0*s.* 6*d.* and 23*l.* 9*s.* 9*d.* were before the commencement of the action received by the said *Phillips* and Co. which they claimed to hold

hold to their own use, and refused to pay over to the assignees. But whether, &c."

Judgment having been given in the Court of King's Bench for the Defendants in error without argument, the case being considered as decided by that of *Hunter v. Potts*, 4 *Term Rep. B. R.* 182. a writ of error was brought which was twice argued, the first time by *Park* for the Plaintiffs in error, and *Heywood*, Serjt., for the Defendants; and the second, by *Bower* for the Plaintiffs in error, and *Law* for the Defendants. As the arguments were nearly the same as those contained in *Hunter v. Potts*, 4 *Term Rep. B. R.* 182. and *Sill v. Worswick*, ante, vol. i. p. 665. and were entered into by the court in giving judgment, they are here omitted.

On this day, after time taken to consider, the opinions of the judges were delivered in the following manner; Mr. J. *Rooke*, Mr. B. *Thompson*, Mr. J. *Heath*, Mr. B. *Perryn*, Mr. B. *Hotham*, and the Lord Ch. B. *Macdonald*, held, that the judgment of the Court of King's Bench ought to be affirmed: but the Lord Ch. J. *Eyre* was of opinion, that it ought to be reversed.

The course of reasoning pursued by those of their Lordships above mentioned, who thought the judgment right, was to the following effect.

The general question arising upon the facts which appear on this record, is, whether the creditor of a bankrupt in *England*, who became such creditor in *England*, having recovered a debt due to the bankrupt in a foreign country by process of attachment in that country, is entitled to retain the money so recovered to his own use, or whether he has not received it to the use of the assignees? It must be remembered, in discussing this question, that it is found by the special verdict, that *Blanchard* and *Lewis* the bankrupts were *English* traders, that the Defendants were partners in an *English* house, that the debt from the bankrupts to the Defendants was contracted in *England*, that the bankrupts as well as the Defendants were resident in *England*, and that *Crammond*, who on this verdict must also be taken to be an *English* subject, went from this kingdom to *America*, for the special and temporary purpose of transacting business for the *English* house at *Manchester*, in which he continued to be a partner. That house was the only one the Defendants had, it not being found that they had any house in *America*. All these facts appearing on the record, this case

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must be argued as arising between *English* subjects upon *English* property. When the debt therefore was contracted, all the parties were as much subject to the bankrupt laws, as to the other laws of *England* under which they lived. It is a proposition not to be disputed, that previous to the bankruptcy the bankrupts themselves might have transferred or assigned this property though abroad, as absolutely as if it had been in their own tangible possession in this country, and it seems that the assignees under the commission were intitled by operation of law to do with it after the bankruptcy what the bankrupts themselves might have done before. The great principle of the bankrupt laws is justice founded on equality. No creditor shall be permitted to acquire an undue preference, and by so doing, prevent an equal distribution among all the creditors. This being the principle of those laws, it seems to follow, that the whole property of the bankrupt must be under their control, without regard to the locality of that property, except in cases which directly militate against the particular laws of the country in which it happens to be situated. No creditor, whose debt was contracted within the sphere of the operation of those laws, and who has notice of the insolvency of the debtor, can recover any part of the common fund for his own particular advantage; after an assignment has taken place, his interest is transferred to the assignees, and if he do recover, he must account to the other creditors for the sum received.

If the bankrupt laws were circumscribed by the local situation of the property, a door would be open to all the partiality and undue preference which they were framed to prevent; it being easy to foresee how frequently property would be sent abroad with that unjust view, immediately previous to, and in contemplation of an act of bankruptcy. If the personal property of merchants employed in the course of their dealings in foreign countries, were to be taken by an individual creditor going from hence for that purpose, and not to be distributable among the creditors at large, such merchants would be materially affected in their credit at home. It is true, that the laws of the country where the property is situated, have the

[406] immediate control over it, in respect to its locality, and the immediate protection afforded it; yet the country where the proprietor resides, in respect to another species of protection afforded to him and his property, has a right to regulate his conduct

conduct relating to that property. This protection afforded to the property of a resident subject, which is situated in a foreign country, is not imaginary, but real. The executive power of this kingdom protects the trade of its subjects in foreign countries, facilitates the recovery of their debts, and if justice be delayed or denied, the King by the intervention of his ambassadors demands and obtains redress. Even in the treaty of peace with *America*, the recovery of private debts due from the inhabitants of that country to the subjects of this, made the ground of a particular article. The property which this country protects it has a right to regulate. And in fact our bankrupt laws have made such regulation. The statute 13 *Eliz.* c. 7. enables the commissioners to take the bankrupt's money, goods, chattels, wares, merchandizes and debts, *wheresoever they may be found or known*. This expression is very extensive, and seems to look beyond the debts and effects of a trader locally situated in this kingdom. In a country, a great part of whose commercial capital is employed abroad, it is peculiarly proper that such capital over which the trader has a disposing power, although situated out of the kingdom, should be considered as referable to the *domicilium* of the owner (*a*). In testamentary cases and in the *successio ab intestato*, the effects are subject to the law which governs the country of the testator or intestate, as was determined in *Pipon v. Pipon* (*b*), and *Thorn v. Watkins* (*c*). The statute 1 *Jac.* 1. c. 15. s. 13. which enables the commissioners to assign debts due to the bankrupt, directs that the same shall not be *attached as the debt of the bankrupt*, according to the custom of the city of *London* or *otherwise*. The assignment being made by the authority of parliament, every subject of this kingdom is a party to it, inasmuch as he is a party and consenting to an Act of Parliament, and having joined in the assignment, he cannot be permitted to contravene it by attaching the debt in the hands of the debtor: and if by means of an attachment he receives the money, it is received to the use of the assignees.

The words of the statute *Jac.* 1. extend to all foreign attachments, both at home and abroad, in countries subject to and independent of the crown of *Great Britain*. As debts due to bankrupts from the subjects of foreign countries pass under the assignment, the attachment must be considered as co-ex-

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(*a*) [*Ante*, vol. 1. p. 690.](*b*) *Ambl.* 25.(*c*) 2 *Ves.* 35.

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tensive with the debts mentioned in the statute. The equal distribution, which it is the policy of the bankrupt laws to establish, is as much infringed by attachments in foreign countries, as in the *British* dominions: the mischief is the same, and the remedy ought to be advanced to meet the mischief. The words "*according to the custom of London*" mean, "*in such manner as is warranted by the custom of London;*" which is put by way of instance or illustration. Many cases already decided on the subject of bankruptcy, go a great way to prove that an individual creditor is precluded from retaining what he shall recover abroad and bring into this country. In *Mackintosh v. Ogilvie* (a), Lord *Hardwicke* by the writ of *ne exeat* prevented the creditor from going to sue in *Scotland*, after the bankruptcy. By giving this preventive remedy against an unconscientious preference, which one creditor might have obtained over the others, his Lordship must be understood to say, that the creditor was bound, as far as the circumstances would enable him to apply them, by the bankrupt laws of this country; and had that creditor effectuated his payments in *Scotland*, it should seem that his Lordship, in order to be consistent, would have obliged him to have accounted with the assignees, if the fund had been brought within his jurisdiction. In *Solomons v. Ross* (b), money attached by an individual creditor, after an assignment in *Holland*, was decreed by Lord *Hardwicke* to be paid to the attorney of the assignees for the benefit of the creditors; plainly considering each creditor as bound by the assignment, and the money recovered here as referable to *Holland*, the country of the debtor. The same is likewise to be inferred from *Jollet v. Deponthieu* (c), and *Neale v. Cottingham* (d). It has been urged, that those cases turned upon this circumstance, viz. that we admit the claim of the assignees in preference to a particular creditor, where bankrupt laws are instituted in the domicile of the bankrupt, but as there are no bankrupt laws in *America*, the reason is not applicable in this case. Now it does not appear upon this record whether there are bankrupt laws in *America* or not. There were none in *Holland* nor *France* peculiar to insolvent traders. The courts therefore here must in those cases have proceeded on a larger principle. But the judgment of Lord *Loughborough* in *Sill v.*

(a) Cited 4 Term Rep. B. R. 191.

(b) *Ante*, vol. i. 131.(c) *Ibid.* 132.(d) *Ibid.*

Worswick (a), is an authority directly in point, and in favour of the Plaintiffs in the present action. The cases opposed, of *Le Chevalier v. Lynch* (b), *Cleve v. Mills* (c), and *Allen v. Dundas* (d), prove only, that where a debtor has paid (not where a creditor has received) money under due process of local law, he shall not be compelled to pay it over again : and *Wilson's* case is truly and satisfactorily explained by Lord *Loughborough* in his judgment in *Sill v. Worswick*, to have turned on the several liens which different creditors had by the law of *Scotland*: but there Lord *Hardwicke* held, that the arresters of the fund which was not so bound, after the bankruptcy, should be postponed to the assignees.

But it is objected that the judgment in *Pennsylvania* is final and conclusive, and binds the property. That it must be so taken to be between the parties, is not disputed. But as the recovery of the Plaintiffs in error, otherwise than for the use of the Defendants, would be in violation of an Act of Parliament, such recovery shall be taken to be for the use of the Defendants. In an action for money had and received, the receipt shall be always deemed to enure to the use of him who hath the right, even though it be taken under an adverse title ; as for instance, when this species of action is brought to try the title to an office (e). Indeed in the present action the judgment of the court in *Pennsylvania* is affirmed. Another objection has been made, that the residence of *Crammond* in *America* enabled him to recover this debt, without accounting for it to the Defendants in error. In order to raise that question, the special verdict should have found that he was resident within the state of *Pennsylvania*. But if that question were raised, no residence in foreign parts can exempt a *British* subject from the operation of an Act of Parliament, much less an occasional residence. It is also imputed to the assignees, and much relied upon, that they did not state their claim in the foreign court, which they ought to have done, instead of bringing their action here. But it is not found by the verdict that they had any notice of the proceedings in that court. No *English* subject can be affected by the proceedings in a foreign

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(a) *Ante*, vol. i. 665.(b) *Dougl.* 169. 8vo.(c) *Cooke*, Bank. Law, 370.

(d) 3 Term Rep. B. R. 125.

(e) [See *Howard v. Wood*, 1 Free-

man, 478, 2d ed., and the note there, in which the cases are collected as to the recovery of money taken under an adverse title in an action for money had and received.]

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court without clear and direct notice: for however *English* subjects are bound by the proceedings in our own courts from a presumption of their having notice of them, no such presumption can be raised with respect to foreign courts. When it is argued, that in many instances the bankrupt laws of this country do not operate in another, it is to be observed, that though to some purposes they do not, yet to all civil purposes they do, when such purposes are neither repugnant to the law of the particular state, nor to the general law of nations. And it is on wise principles that foreign states acknowledge and act according to the different civil relations which subsist between men in their own country. If then there be no law of the particular state, nor any law of nations that forbids the operation of the *English* bankrupt laws on the personal property of an *English* subject wherever it is found, there is nothing to restrict the large words of the statutes 13 *Eliz.* and 1 *Jac.* 1. but an implied power in a foreign country, to declare that an *English* subject becoming bankrupt, shall notwithstanding continue to be invested with all his rights, and in the enjoyment of all his property in defiance of those laws to which he owes submission. But such a power cannot be assumed by any foreign state, nor ought this country to make to any so important a surrender. For these reasons it appears that the judgment of the Court of King's Bench ought to be affirmed.

Lord Chief Justice EYRE. This case, in point of circumstances, lies within a very narrow compass. A *British* subject, a partner in a house at *Manchester*, residing in *America* for the purpose of collecting the debts of the house, having notice of a commission of bankruptcy being issued against a debtor of the house, institutes a suit against the debtor in the Court of *Pennsylvania*, and attaches a debt due to the debtor in the hands of *his* debtor, resident in *Pennsylvania*, finally recovers judgment against the garnishee, and receives from him the amount of his debt. The assignees of the bankrupt debtor bring their action against such *British* subject in the Court of King's Bench, to recover the amount of the money so received, as money had and received to their use. The question is, whether this action can be maintained? This judgment against the garnishee in the Court of *Pennsylvania* was recovered properly or improperly. If notwithstanding the bankruptcy, the debt remained liable to an attachment according to the laws of that country, the judgment

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ment was proper: if according to the laws of that country, the property in the debt was divested out of the bankrupt debtor, and vested in his assignees, the judgment was improper. But this was a question to be decided in the cause instituted in *Pennsylvania*, by the courts of that country, and not by us: we cannot examine their judgment, and if we could, we have not the means of doing it in this case. It is not stated upon this record, nor can we take notice, what the law of *Pennsylvania* is upon this subject. If we had the means, we could not examine a judgment of a court in a foreign state, brought before us in this manner. It is in one way only that the sentence or judgment of the Court of a foreign state is examinable in our courts, and that is, when the party who claims the benefit of it applies to our courts to enforce it. When it is thus voluntarily submitted to our jurisdiction, we treat it, not as obligatory to the extent to which it would be obligatory perhaps in the country in which it was pronounced, nor as obligatory to the extent to which by our law sentences and judgments are obligatory, but as matter *in pais*, as consideration *prima facie* sufficient to raise a promise: we examine it as we do all other considerations of promises, and for that purpose we receive evidence of what the law of the foreign state is, and whether the judgment is warranted by that law. In all other cases, we give entire faith and credit to the sentences of foreign courts, and consider them as conclusive upon us. It has been distinctly admitted in the argument, that we cannot examine this judgment, that the judgment proper or improper must stand, and in particular it is admitted, that for the protection of the garnishee it is a good judgment. If we cannot examine the judgment, there is an end of all consideration of the operation and effect of our bankrupt laws in *Pennsylvania*, that inquiry tending directly to try whether the judgment was proper or improper. The giving up the remedy against the garnishee, was a concession thought absolutely necessary to give colour to this proceeding, and the consequences were not adverted to; it is in truth giving up every thing. If a garnishee in foreign attachment *here*, suffers the goods of *A.* to be condemned in his hands as the goods of *B.*, the condemnation will not protect him against an action by *A.* If he is protected, it is upon the ground of the goods being to be taken to be the goods of *B.*, *modo et formâ* as they are condemned.

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condemned. In neither case can *A.* follow the goods into the hands of him who recovers the judgment; his only remedy is against the garnishee. But it is said, that upon grounds collateral to the judgment, nay even affirming it, the money recovered in *Pennsylvania* shall be deemed to have been received to the use of the assignees. What are these grounds? If it be said that according to the bankrupt laws in force in *England*, the debt recovered in *Pennsylvania* as a debt due to the bankrupt, was in truth not due to the bankrupt, but to the assignees, and consequently in the popular sense the Defendant may be said to have recovered the money of the assignees, then it ought not to have been recovered, which is so far from being collateral to the judgment, that it goes to the very point of it. Another, and the only other ground which has been taken in the argument, is a proposition roundly asserted, that a *British* subject shall not be allowed to contravene our bankrupt laws, by pursuing that legal diligence in a foreign country, which all persons who are not *British* subjects may lawfully pursue. This must be admitted to be a ground perfectly collateral to the judgment. It is a specious and very splendid proposition, but it is not solid; and if it were solid, it concludes nothing towards the support of this action. It was said, that every *British* subject owes obedience (allegiance it was called) to the statute laws of the country. These are fine words; what do they mean? I know that the statute law, and the bankrupt laws in particular, create and establish a rule of property, which may be enforced against every *British* subject in the due course of law; and that if a *British* subject were to fortify his house, and resist the sheriff by force, he would not be allowed so to contravene the bankrupt laws. But if we suppose such a *British* subject to have obtained a legal judgment here in our courts, in direct opposition to the whole scope and tenor of the bankrupt laws, either for want of proof, or by the error of the judge, or in any other manner that can be supposed, may he not lawfully hold that judgment, and pursue it to all its consequences until it is impeached in a due course of law, notwithstanding any moral or political obligation he may be said to be under not to contravene the bankrupt laws? As a proposition in ethics, I have no objection to it, but considered as a proposition of law, it is too general, concluding, as I have before observed, in nothing. Lord *Mansfield* tried what he could make of

of this proposition, that a *British* subject should not be allowed to contravene the statute law of the land, in one of the strongest cases that can be imagined of wilful contravention, the case of marriage contracted abroad (*a*), by *English* subjects withdrawing themselves from *England*, for the express purpose of contravening the statute law respecting marriages, and he failed altogether. This should teach us not to hazard any thing upon so general a proposition, which breaks under us as often as we attempt to support any particular conclusion upon it. The proposition as applied to this particular case is as inconvenient, impolitic and unjust, as it is unfounded. It was well said in the argument, you admit that an *American* might in this case have pursued his legal diligence in the courts of his own country notwithstanding our bankrupt laws, and that you could not have taken the money recovered from him, and given it to the assignees; will you then compel the *British* subject to sit still, and see the foreigner exhaust that fund which might have satisfied his debt, and so far relieved the fund for the creditors at home? I have heard no answer to that question. Such small circumstances as notice and making affidavits here, for the ground of the suit in *America*, appear to have made some impression in the argument. Has not the foreigner his agent here? May he not have notice and the assistance of affidavits taken here? Shall he pursue his legal diligence by these means, and under these circumstances with effect? If he shall, I cannot discover either good sense or justice in the rule which shall take the money recovered by the *British* subject under similar circumstances, and give it to the assignees of the bankrupt, even for the laudable purposes of an equal distribution. In a case where the rule would produce no such unjust inequality as it must produce in this case, in the condition of a *British* subject and a foreigner, we are not accustomed to treat legal diligence with so much harshness. For instance, our courts of equity distribute among creditors of equal degree, or general creditors, as it shall happen to be a case of legal or equitable assets, *pari passu*. The rule is as well known as the bankrupt laws. But they do not complain that equity is contravened by that creditor, who, using legal diligence, secures the payment of his whole debt perhaps of inferior degree. Even in the administration of the bankrupt laws, (these Acts

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(a) 2 Burr. 1080. Co. Litt. Hargr. and Butl. not. 79 b.

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of Parliament which no *British* subject is to contravene) legal diligence is every day pursued against the bankrupt, in direct opposition to the spirit of those laws. A creditor who has arrested him upon mesne process before the bankruptcy, may detain him in prison up to the moment of his obtaining his certificate; he may elect to proceed against him at law, and not to come in under the commission, and if he happens to have the good luck to have pursued his legal diligence to an execution, and sweeps away all the effects of a man notoriously insolvent, one minute before the debtor has committed an act of bankruptcy, he disappoints, with impunity, the whole effect of the bankrupt laws, and the claims of all the other creditors to an equal distribution of the estate of the debtor, founded upon those laws. So far is it from being true that a *British* subject shall not be allowed to contravene an Act of Parliament in any sense applicable to this case, that it is always a question *strictissimi juris* between a creditor pursuing legal diligence, and the assignees of a bankrupt. How much more rationally is this subject treated, in the loose note (as it was called) of *Waring v. Knight* by Lord *Mansfield*, who, we all know, carried the notion of fraud upon the bankrupt laws to its utmost extent! It is there said, if a man uses legal diligence in a foreign country and obtains a preference, it cannot be helped; but that if he afterwards come here for a dividend, he shall first refund what he has so acquired by his legal diligence, and come in equally with the rest of the creditors, or not come in at all. This is the only fair and practicable coercion that can be used towards creditors abroad, unless they happen to be so unfortunate as to be *British* subjects. These it seems are to have what they have acquired by their legal diligence abroad, taken from them by force of the new invented legal maxim, that no *British* subject shall be allowed to contravene an Act of Parliament. But if this maxim were as well known and established, as it is new and unheard of in our law, it would conclude nothing to the title of the Plaintiffs in this action, for we must go back again to the old question, whether the assignees of a bankrupt have by the laws of *Pennsylvania*, the property of the bankrupt vested in them, of which we know nothing. And then comes a second question, not of easy solution, whether money received upon an adverse judgment, and where there is no other privity or relation than that which
 subsists

subsists between assignees and a particular creditor, can be considered as money had and received to the use of those assignees? The case of *Moses v. Macferlan* (a) is I believe the only decided case that countenances such an action, but I cannot subscribe to the authority of that case. I will state the case shortly and make some observations upon it. *Macferlan* sued *Moses* in the court of conscience, as indorser of a small bill of exchange, and recovered against him there, in breach of an agreement in writing between them, that *Moses* should not be liable nor prejudiced by reason of his indorsement. *Moses* paid the money, and brought an action in the King's Bench to recover it back, as money had and received to his use, and did recover it. In the argument of the case it is distinctly admitted, that the merits of a judgment can never be over-hauled by an original suit either at law or in equity, that till the judgment is set aside or reversed, it is conclusive as to the subject-matter of it, to all intents and purposes. An attempt is made to distinguish between the judgment and the ground of that action, I think not with much success. The proposition that the ground upon which that action proceeded was no defence against the sentence, can hardly be maintained. Suppose it had been a suit in the Court of King's Bench, instead of a court of conscience, would it have been a defence there? If it would, why not in a court of conscience? Is there to be a recovery in a court of conscience only to be overturned by an action in the King's Bench? It is said, they might go into agreements and transactions of great value; doubtless they might, if those transactions give a defence against a debt of which they have jurisdiction. Is it not necessarily incident? The true objection, if there be an objection, is, that such courts ought to have no jurisdiction at all, because the jurisdiction, if they have it, will draw to it cognizance of matters of which they must be very incompetent judges. It may be questionable whether a set off of a debt arising out of their jurisdiction can be pleaded or used; but that does not draw into question the truth of the proposition that every thing that goes to the essence of the debt demanded, must of necessity be within their jurisdiction. To say that the merits of a case determined by the commissioners, where they had jurisdiction, never could be brought in question over again in any shape whatever, and to

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say that yet the Defendant ought not in justice to keep the money, is not intelligible to me. The cases put all suppose a real fact differing from the fact as represented and made the ground of the judgment. They are the cases of the indorsee recovering against the indorser on a bill paid by the drawer: the insured recovering upon the loss of a ship coming home, or upon a life where the party is still living (*a*). In all of them, the very ground of the judgment is brought in question over again, contrary to the admission. Put another case: a man recovers a debt before paid, the receipt is mislaid, and afterwards found; the receipt disproves the whole ground of the recovery, yet this action was never thought to lie (*b*). In this case, perhaps the money paid on the receipt might be got back, because the party by bringing the action disaffirms the application of the money received to the payment of the debt. One of the cases put, is upon the representation of a risk deemed to be fair, which *comes out* afterwards to be grossly fraudulent. Is not this *coming out* produced by trying the question over again? If one could conceive an action by him who had been wronged by the judgment, founded upon the judgment, it might steer clear of the difficulty. Suppose one to say, "you have recovered a judgment against me, which you ought not to have done, whereby I am injured;" this is making the judgment a part of the *gravamen*. In the argument of the case of *Moses v. Macferlan*, it is supposed to be the same thing, as to the force and validity of the judgment, whether the action had been brought upon the agreement, or to refund the money. But it appears to me to be a very different thing. Most certainly the case of *Dutch v. Warren* (*c*) does not prove the proposition. The ground of that case was the disaffirmance of the contract upon which the consideration money had been paid. If the contract could be disaffirmed, doubtless the consideration money remained money paid without consideration, and consequently money had and received to the Plaintiff's use. How does this apply to the case of money recovered by a judgment? It is agreed that the judgment cannot be disaffirmed, but must stand. If the contract in *Dutch v. Warren* could not

(*a*) [*Vide Moses v. Macferlan*, 2 Burr. 1009. Bull. N. P. 130.]

(*b*) [It has been decided that such an action cannot be maintained, *Marrion v. Hampton*, 7 T. R. 269. 2 Esp.

N. P. C. 546. S. C. and see *Brown v. McKinally*, 1 Esp. N. P. C. 279. *Gower v. Popkin*, 2 Stark. N. P. C. 85.]

(*c*) Cited 2 Burr. 1010.

have

have been disaffirmed, but must have stood, could the money have been recovered by this action? Would it not have remained the consideration of an agreement, and the party left to proceed upon his agreement. In the case of *Moses v. Macferlan*, I think the agreement was a good defence in the court of conscience; but if it were otherwise, the recovery there was a breach of the agreement, upon which an action lay; and this was in my judgment the only remedy. Shall the same judgment create a duty for the recoveror, upon which he may have debt, and a duty against him, upon which an action for money had and received will lie? This goes beyond my comprehension. I believe that judgment did not satisfy *Westminster Hall* at the time; I never could subscribe to it; it seemed to me to unsettle foundations (a). I can imagine but one case, in which money recovered by one man shall be money had and received to the use of another. I mean the case of an attorney or agent, who may sue in his own name. In that case, the action by the principal for money had and received, does in truth affirm the judgment, and does proceed upon a ground collateral to it, which is sufficient to maintain the action. In that case the ground of the action for money had and received, is not adverse to the judgment; if it were, it would neither affirm the judgment, nor be collateral to it. The other cases which were cited in the course of the argument, the identical case determined in the Common Pleas excepted, go but a very little way towards maintaining the judgment in the case now before us: perhaps they will be found to bear against it. Lord *Hardwicke's* injunction militates directly against it. Equity interposed in that (right or wrong I shall not inquire) for the express purpose of preventing that legal diligence being used, the effect of which, if used, could not be prevented or remedied. In our case legal diligence has been used. The case before Lord *Bathurst*, supposing the determination to have been right, proves that our laws adopt foreign bankrupt laws, and give them effect; upon which ground equity interposed, and prevented the judgment in foreign attachment obtained here from being set up against the creditors. The analogy is, that the laws of *Pennsylvania* should adopt our bankrupt laws, and that

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(a) [*"Moses v. Macferlan, has been properly questioned in many cases," per Heath, J. Brisbane v. Dacres, 5 Taunt. 160. and see ante, p. 415, note (b).*]

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their courts should be applied to interpose to prevent their judgments in foreign attachment being set up against the assignees. It does not follow from that case, that if the curators had made no application here, but had found the Plaintiff in the foreign attachment in *Holland*, that they could have taken from him the benefit of his judgment; and if they could by their laws, it would not follow that in this case we can do the same by our laws. The case from *Ireland* proceeds upon the same ground, and is in principle the same case with that before Lord *Bathurst*: they judged of the effect of their own foreign attachment; judging upon a subject which they were competent to judge of, they held that the law of *Ireland* adopted the bankrupt law of *England*, and so they defeated the judgment of their own courts in foreign attachment. In the case from *Scotland*, their courts decided upon the priorities and effects of their own process of legal diligence; whereas we are taking upon ourselves to judge of the effect of legal diligence in a foreign state. Upon the whole I rest my judgment upon the following propositions, 1st. That the Plaintiffs' demand in this action, arising out of a transaction in a foreign state, though it may follow the person, must be judged of according to the laws of that state. 2dly. That upon this record we may have no means of knowing, and cannot take notice of the laws of the foreign state in which this transaction arose, and consequently cannot know that the Plaintiffs are entitled to maintain this action. The conclusion from these two propositions to the particular case of the Plaintiffs appears to me to be irresistible. They claim as assignees of a bankrupt, under a title derived to them under our bankrupt laws, to recover a debt due to the bankrupt in *America*. If our bankrupt laws are allowed to operate in *America*, they may be entitled to recover that debt against somebody; if they are not allowed to operate in *America*, they cannot be entitled to recover against any body. But we cannot know whether our bankrupt laws are or are not allowed to operate in *America*, and therefore cannot know whether the Plaintiffs have or have not title to recover against any body. My third proposition is, that if it had been clear that our bankrupt laws have as full effect in *America* as they have here, the assignees ought to enforce them against the garnishee, and not against the Plaintiffs in error, with whom they have nothing to do: I repeat with whom they have nothing to

to do, because I mean to negative *a 4th proposition, viz. that a *British* subject shall not be allowed to contravene a *British* Act of Parliament. This proposition can hardly be said to be true in a popular and vulgar sense, and as I take it, is not true in any sense, in which it can be made to bear upon the assignees' title to recover in this action. My last proposition is, that upon a judgment recovered and executed, which for the sake of the argument I suppose ought not to have been recovered, an action for money had and received will not lie for any body, not even for the person against whom the judgment has been so unjustly recovered.

The result of the whole is, that upon this record it cannot be collected that the assignees have any ground of action here or elsewhere against the Defendants; at any rate this action will not lie, and consequently, in my opinion the judgment ought to be reversed. But as the majority of the judges are of a different opinion, the judgment of this court will be, that the judgment of the Court of King's Bench be affirmed.

Judgment affirmed.

BENGOUGH *against* ROSSITER.

In the Exchequer Chamber, in Error.

(See 4 *Term Rep. B. R.* 505.)

Wednesday,
Feb. 11th.

DEBT on bond. The Defendant, after craving oyer of the bond, by which he and two others became jointly and severally bound to the Plaintiffs *as Sheriffs of Bristol*; and of the condition, which was for the Defendant to appear before the Mayor and Aldermen of *Bristol*, justices assigned to keep the peace, &c., at the next general quarter-sessions to be holden, &c., in the *Guildhall* in the said city, on, &c. to answer, &c., touching a certain trespass and assault whereof he was indicted, pleaded, that at the time of making the said writing obligatory, he had been indicted for the trespass and assault in the condition mentioned, and that a *capias* was issued out of the Court of Sessions of *Bristol*, directed to the then Sheriffs of *Bristol*, commanding them to take the said Defendant, and him safely keep, so *that they might have his body before the said justices in the condition mentioned, at the next general quarter-sessions, &c.

A bond given to the sheriff, conditioned for the appearance of a person arrested by him on process issuing upon an indictment at the quarter-sessions, is void. [The Sheriff can only take a recognizance for their appearance.]

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&c. there to answer, &c. The plea then stated the delivery of the writ to the Plaintiffs as Sheriffs, and the arrest of the Defendant by virtue thereof, and that the Defendant executed the said bond with the said condition *in order to obtain his discharge* from out of the custody of the Plaintiffs, who thereupon set him at liberty; *the said indictment in the said condition of the said writing obligatory mentioned then being pending and wholly undetermined*; and that the Defendant did not upon, or at any time before or after the making the said writing obligatory, or before the exhibiting of the Plaintiff's bill, *enter into any recognizance, or other security whatsoever to our said lord the now king, for his appearance at the said sessions*, in the condition of the said writing obligatory mentioned, or at any other court or sessions whatsoever, to answer the said indictment, &c. or in any other manner whatsoever touching the said trespass, &c., nor was any such recognizance or security entered into or given to our said lord the king in that behalf. The second plea was the same as the former, except that it stated that the Defendant while in custody upon the arrest, executed the bond *in order to obtain, and in consideration of then and there obtaining his discharge out of custody*; which bond the Plaintiffs accepted on the occasion and for the cause and consideration aforesaid, and thereupon then and there set at liberty and permitted the Defendant *to escape* and go at large, &c., the said indictment being then pending and wholly undetermined, &c. The third plea was also the same as the first, as far as the averment of the Plaintiffs having set the Defendant at liberty, after having executed the bond, in order to obtain his discharge; and then was added this further averment, that no writ of *venire facias* issued or was sued out against the Defendant upon the said indictment mentioned, &c., previous to the issuing of the said writ of *capias* against the Defendant; nor was he thereby or by any other writ or process whatsoever summoned to appear or answer to the said indictment, before the issuing of such writ of *capias*.

The Court of King's Bench having given judgment for the Defendant, on a demurrer to these pleas, a writ of error was brought, which was twice argued, the first time by *Marryat* for the Plaintiffs, and *Lawes* for the Defendant; the second, by *N. Bond* for the Plaintiffs, and *Gibbs* for the Defendant. As the

[420] Court (being divided in the same manner as in the preceding case

case of *Hunter v. Phillips*) entered fully into the subject in giving judgment, the arguments of the counsel are not stated. Those judges who were of opinion that the judgment of the Court of King's Bench was proper, reasoned in the following manner:—

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The question in this case is, whether the Sheriffs of *Bristol* were enabled by the statute of 23 *H. 6.* to take the obligation mentioned in the pleadings? Now though the words of the statute are sufficiently large, taken in their literal sense, to give sheriffs the power of bailing on indictments of trespass before justices, yet the interpretation of this as well as other antient statutes, must be made, not merely according to the literal sense, but according to the subject-matter, the interpretation of other statutes made in *pari materiâ*, precedents, the authority of text writers, and long and constant usage. In order to arrive at the true interpretation, it is necessary to inquire what the sheriff's power of bailing was antecedent to the statute in question. At common law the sheriff might bail either on writ or *ex officio*. The latter power only appertains to the present inquiry. This power of bailing *ex officio* was incident to his power of awarding process, and giving judgment on indictments. The principle on which it is founded demonstrates its extent. The first statute which limits his power is the statute of *Westminster 1st.* (a) which was a remedial and a declaratory law. In the declaratory part it states, that except in three cases therein specified, it was doubtful in what case the sheriff ought to replevy prisoners in his custody; and it proceeds to mention the cases, in which he is commanded to let them on mainprize, adding these material words "*sans rien donner de leur biens*", by which he is forbidden by necessary inference, to take an obligation for money. This clause will serve to interpret that of 23 *H. 6.* as will hereafter be shewn. It is evident that this statute (*Westminster 1.*) does not extend to persons indicted before justices, who did not exist at the time when it was passed. They were created by virtue of a subsequent statute 4 *Ed. 3. c. 2.* which first gave them a power of taking indictments, which were afterwards to be tried by the justices of gaol delivery, and which expressly enacts, "that such as shall be indicted, or taken by the said keepers of the peace, shall not be let to mainprize by the sheriffs, nor by none other minis-

(a) 3 *Ed. 1. c. 15.*

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“ ters, if they be not mainpernable by the law, and that such as
“ shall be indicted, shall not be delivered but at common law.”
This statute shews the policy of the legislature, which expressly prohibits the sheriff from bailing, *ex officio*, persons indicted before justices; for that seems to be the true construction of this statute. It evinces the decided preference given to the jurisdiction of the justices, and the jealousy entertained by the legislature, lest the authority of the sheriffs so corruptly exercised, should interfere with the new and favourite jurisdiction. As at the time of making the statute 23 *Hen. 6. c. 9.* sheriffs had a most extensive criminal jurisdiction in their tours, and incidentally a power of bailing persons indicted before them, the question is, whether the power given to them of bailing by obligation, is to be restrained to indictments for trespass taken in their tours, or to be extended to indictments for trespasses before justices. If the latter interpretation were to take place, it would follow, that the legislature would by the same words modify an existing power, and create a new one in the same subject-matter, without announcing such an intention. But it seems to be a good rule of construction, that where a statute modifies an existing power of a known officer, it shall not be construed to give a new power, unless such intention be clearly expressed, or may be collected by necessary legal inference. And this would be the more extraordinary in the present case, where the mischief to be remedied is the abuse of the then existing power confided to the sheriffs. If all the antient statutes be examined from *Magna Charta* to the 1 *Edw. 4.* both inclusively, a period of two hundred years, relative to the criminal jurisdiction of sheriffs, and to the abuse of their power of bailing, they will be found most ample in the detail of the extortions, perjuries and oppressions of the sheriffs and their officers. One grievance is stated in all the statutes; they bailed for money such as ought not to be bailed, and they extorted money from those who were intitled, and demanded to be bailed. Their jurisdiction was become most odious. The legislature in every reign abridged some part of their power, and increased the jurisdiction of the justices, until at last they were deemed so incorrigible, that their whole criminal jurisdiction was expressly, and the power of bailing for offences in their tours incidentally, taken away, and transferred to the justices of the peace, by the statute 1 *Edw. 4. c. 2.* which

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was

was deemed the first and most welcome present that a young king on the accession of a new family to the throne, could make to his people. These observations may serve as an answer to an argument that has been used on the part of the Plaintiff in error, in considering this statute, namely, that as it gives a new power in civil cases, therefore it may be construed to give a like power in criminal cases; and that the one should be considered co-extensively with the other. But the cases are also in themselves different. Before the passing the statute 23 H. 6. sheriffs had no power *ex officio* to bail without writ, persons in their custody on civil process; they could only do so on the writ *de homine replegiando*; but in criminal cases they had a power of bailing persons indicted before them in their tours. In respect to civil process, the power of bailing given to them was totally new; in respect to criminal process, it was only new as to the mode of taking an obligation; for the sheriff without writ, before the statute, might have let out on mainprize such persons as were indicted in his tourn. This statute being in *pari materiâ* with the statute of *Westminster* 1, the true exposition of the one may be found by comparing it with the other. By the express terms of the statute, *Westminster*, 1. sheriffs are restrained from taking any thing of those they let to bail, whether they be indicted for felony or trespass. This, by necessary implication, restrained the sheriffs from taking bonds of those whom they bailed. The statute of 23 H. 6., in fact repeals as much of the statute of *Westminster*, 1. as prohibits sheriffs from taking bonds of those who were indicted of trespasses in their tours; but as the statute of *Westminster*, 1. does not extend to justices of peace, the subsequent statute which in part repeals it, ought not to receive a more extensive construction. A contrary construction of the statute 23 Hen. 6. would be inconvenient in another respect, that the sheriff cannot judge what bail he ought to require of persons indicted before justices for offences not appearing in the *capias*; but he was under no such difficulty in bailing those who were indicted in his tourn, for he might see the indictments. And no mischief can arise to the public from the construction contended for, since the party in prison may be bailed at present by the justices of the peace. It can scarcely indeed be imagined that the uniform policy of the legislature, manifested in all the other statutes from *Magna Charta* to the

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1 *Edw.* 4. and the constant preference given to the jurisdiction of the justices, should in this statute alone, which equally condemns the excesses of the sheriffs, be changed and altered. The statute of 1 *Edw.* 4. is clearly a virtual repeal of 23 *H.* 6, so far as respects indictments taken in the sheriff's tourn, because it takes away his power of awarding process, and giving judgment on such indictments. From thence the inference was probably drawn, that it was a virtual repeal *in toto*; for it would be a whimsical construction of the statute of 1 *Edw.* 4. to make it abrogate the power of bailing by the sheriffs, in respect to their own jurisdiction, and to let it subsist in respect to the jurisdiction of the justices. Suppose that the sheriff as conservator of the peace should have committed a person to gaol for a breach of the peace, and that an indictment in his tourn had been found against the person for the offence, the sheriff could not have bailed him: but if the arguments on the other side be well founded, as soon as the indictment had been delivered to the justices of the peace, he might have bailed him. Again, the sheriff could not bail on indictments in his tourn, where he could apportion the bail to the magnitude of the offence, but he could bail on indictments of trespass before justices where he had no rule to guide his discretion. For these reasons, and from these apparent incongruities, it is evident, either that indictments before justices are not within the purview of the statute 23 *Hen.* 6 or that the statute is virtually repealed *in toto* by the statute 1 *Edw.* 4. It has been alleged, that the statute of 1 *Edw.* 4. could not have been considered as a repeal of the statute of 23 *Hen.* 6. because the practice of bailing, by the sheriff, prisoners for trespass by obligation, subsisted after the 1 *Edw.* 4. and the year book 7 *Edw.* 4, 5. is insisted on. In that case the obligation was taken to a stranger. The statute 23 *Hen.* 6. was pleaded, and *Catesby* a Serjeant of counsel with the Plaintiff, objects to the conclusion of the plea, which objection is allowed. The reporter seems to have no other object in view than to give the opinion of the court as to the plea, for the report is very short, and only to one point; what became of the case afterwards does not appear.

[424] No conclusion can be drawn from this case of usage; it should rather seem that the sheriff in taking the bond in the name of a stranger, was conscious that he could not take it in his own name, and meant to elude the law. The authority of the text
 writers

writers is next to be considered, and the usage since the statute of 1 *Edw.* 4. was passed. The counsel for the Plaintiff have insisted on the passages in *Fitz. Nat. Brevium* 564, and 565, *Tit. Mainprize*, where it is laid down, that the sheriff is bound by the statute of 23 *Hen.* 6., to let to bail persons indicted before justices in trespass, if they be not condemned. But in the same chapter, and in the next paragraph, it is likewise said, that the sheriff, upon a writ sued out of chancery, may bail persons condemned in trespass before justices, which is clearly not law. This shews the inaccuracy of the author, and invalidates his first proposition, so far as it depends on his authority. The first proposition relative to the statute of 23 *Hen.* 6. has nothing to do with the writ of mainprize which is the subject of the chapter; and there is a manifest contradiction between that and the subsequent paragraph, in respect to persons condemned by justices. From the inconsistency therefore of the paragraph relied on with the next that follows, and from its irrelevancy to the subject, there arises a suspicion that it is an interpolation by some injudicious person. Stress has also been laid on what is said by *Hale*, *c. P. C.* 132, and 136. In the former passage he observes, that persons in custody by writ or process issuing from other courts, althoughailable by such courts, were notailable by the writ *de homine replegiando*, nor by the sheriff *virtute officii*, till the passing of the statute 23 *Hen.* 6. *c.* 9. From this *dictum* it should appear that he thought the power of the sheriff was enlarged by the statute; and in p. 136, he expressly says, that in some respects the sheriff's power of bailing in offences not capital, was enlarged by the statute, and that there is not only power, but command to the sheriff, to let out by sufficient sureties parties arrested in personal actions, and upon indictments of trespass. But Lord *Hale* does not furnish us with the grounds on which his opinion, as far as it can be collected from these *dicta*, is founded, in that accurate and satisfactory manner which is usual with him. It does not appear, that he anywhere considered the effect which the statute 1 *Edw.* 4. *c.* 2. might have upon the 23 *Hen.* 6. *c.* 9. admitting the sheriff's power to have been thereby extended. To this authority of *Hale* [425] may be opposed that of *Hawkins*, who says, *b.* 2. *c.* 10. *s.* 74, "there is not the least intimation of an intent to enlarge the "sheriff's power in taking indictments, but the whole purport
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“ of it (the statute 1 *Edw.* 4.) is to restrain him from pro-
“ ceeding upon them. It has also been held, that this statute
“ takes away the power which sheriffs had by the common law,
“ and the statute 23 *Hen.* 6. c. 9. of bailing persons indicted
“ before him in his tourn, and obliges him to return such in-
“ dictments to the justices at the next sessions.” And *b.* 2.
c. 15. s. 27. “ It seems certain that by the common law, the
“ sheriff might bail any person who was indicted before him at
“ his tourn, for felony, or any other crime that isailable, be-
“ cause he might both award process, and also give judgment
“ against the person so indicted; and it is a general rule that
“ whosoever is judge of the offence may bail the offender. But
“ it is holden that at this day the sheriff has lost his power by
“ reason of 1 *Edw.* 4. c. 2.”

To the authority also of *Hale* may be opposed the silence of Lord *Coke* (*a*) and *Staunford* (*b*), who make no mention of the statute 23 *Hen.* 6. though each of them has written expressly on the subject of bail. *Dalton* (*c*) indeed mentions it, without the least comment, and takes no notice of 1 *Edw.* 4. On the whole, therefore, it appears that no great weight can be laid on the authority of text writers, who have considered the stat. 23 *Hen.* 6. in respect to this point, as an existing law, for they do not seem to have paid much attention to the subject, nor to have taken into their consideration the several statutes *in pari materiâ*. It is sufficient to warrant the judgment of the Court of King's Bench, if, for the reasons already given, this construction of the statute shall only appear to be probable, since the main ground on which that judgment will rest is the universal usage that has taken place throughout the kingdom, except in the city of *Bristol*. Such usage must now be understood to have prevailed from the time of the statute 1 *Edw.* 4. Supposing then a construction of the 23 *Hen.* 6. to be doubtful, and that the authorities cannot be reconciled, constant usage would, in such case, be the best expositor of an ancient statute. For these reasons it seems that the judgment ought to be affirmed.

[426] Lord Chief Justice EYRE. I am so unfortunate as to differ a second time from my Brethren; but I am bound by my opinion, and it is my duty to deliver it.

(a) 2 Inst. West. 1. c. 15. 4 Inst. c. 31.

(b) B. 2. c. 18. tit Mainprize.
(c) Cap. 96.

The effect of the judgment in this cause for the Defendant in error, is to make the solemn act and deed of the party, his writing obligatory under seal, null and void. The grounds in law producing such an effect ought to be clear and cogent. Both parties refer themselves to the statute 23 *H. 6. c. 9.*; the Defendants in error to impeach the bond, as a bond taken by sheriffs by colour of their office in other form than that which is warranted by that statute, and therefore by the express words of the statute declared to be void; the Plaintiffs in error to maintain the bond, as made to them by the name of their office, upon the condition and in the form warranted and even required by that statute. If the words of the statute, according to their literal and obvious interpretation, were to be our sole guide, this bond must be held to be good; for that statute requires, “that sheriffs shall let out of prison all manner of persons by them arrested, or being in their custody by force of any writ, bill, or warrant, in any action personal, or by cause of indictment of trespass, upon reasonable sureties of sufficient persons, having sufficient within the counties where such persons be so let to bail or mainprize, to keep their days in such place as the said writs, bills, or warrants shall require;” and the obligation to be taken for any cause aforesaid, of any person or by any person which shall be in their ward, is to be to themselves by the name of their office, upon condition that the prisoner shall appear at the day contained in the writ, bill, or warrant, and in such place as the writ, bill, or warrant shall require. Such being the requisition of the statute, this is in point of fact an obligation made to the Plaintiffs in error, by the name of their office by the Defendant in error, who was in their ward by the course of the law upon a *capias* by cause of an indictment of trespass, upon condition that he should appear, which is keeping his day at the general quarter-sessions, which was the place in which the writ required him to appear. But it has been argued that by construction, the words “*by cause of indictment of trespass*” in the first of the two branches of the statute, which I have stated, are to be qualified and restricted to indictment of trespass before the sheriff in his tourn, and it is added, that by an implication from the statute of 1 *Ed. 4.* which statute takes from the sheriff the power of proceeding upon indictments taken before him in his tourn, sheriffs have no power under 23 *H. 6.* to let out of prison upon surety any persons arrested or being in their custody

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tody by cause of indictment of trespass. I may have occasion to take some notice of this implication hereafter; at present, I shall only observe upon it, that it will suffice for the Defendant in error, if he can make out that the indictment for trespass mentioned in the statute of 23 *H. 6.* means indictment taken before the sheriff in his tourn, even though he should fail to establish his implication from the statute of 1 *Ed. 4.*; for I agree, that if by the statute 23 *H. 6.* the sheriff could only bail persons in his custody upon indictment of trespass taken before him in his tourn, this obligation by a person arrested by *capias* upon an indictment taken before the justices at their quarter-sessions, will be null and void. To maintain the proposition as I have stated it, on the part of the Defendant in error, he must begin with proving, that by the true construction of the statute 23 *H. 6.*, the indictment of trespass there mentioned, means an indictment taken before the sheriff in his tourn. If he argues, that because the statute 1 *Edw. 4.* hath taken from the sheriff the power of proceeding upon indictments taken before him in his tourn, therefore by implication the sheriff's power of taking bail upon indictments for trespass under the statute of 23 *H. 6.* is taken away, he begins at the wrong end. It may be taken away, if it never extended to any indictments but those taken before him in his tourn, but if it did extend further, there is no colour for such an implication: he must first prove, therefore, that it did extend no further. But this he has not proved to my satisfaction. Such a construction of the statute would, in my judgment, be as contrary to the spirit, as it would be to the letter of it. I am of opinion that neither the letter nor the spirit of the statute, nor the law as it stood at the time of the making of the statute, nor the law as it stands at this day respecting bail and mainprize, will bear out such a construction,—I go further,—will admit of it. This proposition I take to be clear, at the common law, and in the result of all the old statutes upon the subject, all persons in custody upon mesne process for any cause short of treason or felony (some forest cases, and cases of commitments *per speciale mandatum* (a), perhaps excepted) were replevisable, and were to be delivered out of prison by those who had the custody of them, who were principally sheriffs, and bailiffs of franchises upon security. All the writers agree, that the sheriff

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(a) Hawk. b. 2. c. 15. s. 36, 37, 38. tit. Bail. 2 Inst. 186.

did

did *ex officio* deliver to mainprize all such persons in custody upon mesne process, issued by himself. It appears from the register, as well as from all the text writers, that either by the writ *de homine replegiando*, or *de manucaptione*, (not to mention the writ *de odio et atia*, which being very special, and confined to one case, I pass by,) the sheriff did deliver to mainprize all persons in custody upon mesne process issued by himself. It also appears from the register, that the friends of the persons in custody might, if they thought fit, go to the Court of Chancery, and there take those persons to mainprize, and then obtain a writ to the sheriff to deliver them. Assuming it therefore, as the law of the land, that in one manner or other all persons in custody on mesne process on indictments for trespass were replevisable by the sheriff, and also by Chancery, in which last case, the sheriff was the minister to deliver the party, I ask, whether when a mode was to be devised for taking bail in all personal actions, it was not sound policy, and in the strictest analogy to the law as it then stood, that Parliament should interpose to give ease to the subject by substituting the ready and cheap method of taking bail, and to remove the occasions of the extortion mentioned in the preamble of the statute, by requiring and compelling the sheriff to take bail in the case of all indictments for trespass, in the room of the circuitous and expensive course by writ, or by taking the prisoner to mainprize in the Court of Chancery. I confess I did not imagine that any man could read the statute of 23 H. 6., supposing the ground which I have taken to be solid, and doubt whether it was the meaning of that statute to give this easy mode of letting to bail persons in custody on mesne process in the case of *all* indictments for trespass. The language of the statute is not neutral in this argument, it is not only proper for the case of mesne process on all indictments, wheresoever found, but the whole composition and arrangement of the words of this branch of the statute, and the whole context require, that the relief intended for the subject should not be confined to the case of process upon indictments before the sheriff himself, and in truth hardly admit of that case being included in the statute. Let the words of the statute-book speak for themselves: “ And that the said sheriffs, and all other officers and
“ ministers aforesaid, shall let out of prison all manner of per-
“ sons by them or any of them arrested, or being in their cus-
“ tody

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“tody by force of any writ, bill, or warrant, in any action personal, or by cause of indictment of trespass upon reasonable sureties of sufficient persons having sufficient within the counties where such persons be so let to bail or mainprize, to keep their days in such place, as the said writs, bills, or warrants shall require.” That these were words proper to be used by the legislature, supposing them to have intended to extend the provision to *all* indictments for trespass wheresoever taken, I think no man will deny. Let us attend to the arrangement of them: they close the enumeration of the cases, in which the sheriffs and other officers are to let persons out of prison. “*By cause of indictment of trespass*” is as comprehensive a term, as “*any action personal*” which immediately precedes it; and it stands part of an enumeration of cases, followed by the declaration of the condition upon which all these persons are to be let out of prison. Now mark the condition, it is upon *reasonable sureties, &c.* “*to keep their days in such place as the said writs, bills, or warrants shall require.*” This condition, from the nature of it, as well as from the place it holds in the composition of the whole period, must apply to persons arrested upon indictments of trespass, as well as to persons arrested in personal actions. Then let it be considered for what these persons arrested on indictments of trespass are to give sureties. It is “*to keep their days in such place as the said writs, bills, or warrants shall require;*” apply these words to the personal actions, and they mark distinctly that it is a personal action in any place and before any court. Can they be construed differently as applied to the indictment for trespass? And particularly, can they, without extraordinary violence, be tied up to one place only, the sheriff’s own tourn? I will here observe, that the condition for keeping their day in such place as the said writs, bills, or warrants shall require, being necessarily applicable to the case of persons arrested by cause of indictment of trespass, as well as to persons arrested in personal actions, will afford an answer to a verbal criticism, by which it was attempted to restrain the writ, bill, or warrant in the first part of the sentence to the personal action. That criticism had its use; it was meant to smooth the way for a limited construction of the words, “*indictment of trespass*”, consistent with a general construction of the words “*personal action*”; for which there could hardly be a colour,

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colour, if the words "*writ, bill or warrant,*" were understood to apply to both. That they must apply to both, is not only manifest from the frame and composition of the whole paragraph, but this absurdity will follow if they are not so understood, that the legislature must be supposed to have intended to command the sheriffs and other officers, to let persons arrested on *some* indictments of trespass out of prison, without any condition at all. This condition of keeping their day, &c. being necessarily applicable to the persons indicted of trespass, this further observation arises upon the terms of it. They are to *keep their day in such place as the writs, bills or warrants, shall require*; in a subsequent branch of the statute this is explained to mean, that the prisoners shall appear at the day, and in such places, as the writs, bills or warrants shall require, which I take to be perfectly inapplicable to the case of a prisoner in custody on an indictment in the sheriff's tourn, who would stand committed till he should be delivered in due course of law. If we consider this branch of the statute with the whole context, we shall find that it is a part of a general plan for the regulation of the conduct of sheriffs and other officers, in their *ministerial* capacity only, and in respect of articles in which they have a duty in common. It was hardly to be expected, that in a well digested statute of such a kind, one should find so anomalous a provision crowded in as a regulation of the conduct of the sheriff in his *judicial* capacity, in which he must always act when he lets out of prison upon surety persons taken upon indictments before himself in his tourn. When the legislature thought fit to interpose for the regulation of the conduct of sheriffs in their judicial capacity, as was done in the first year of the reign of *Edw. 4.*, when the act passed authorizing justices of peace to award process upon indictments taken in sheriffs' tourns, they confined themselves strictly to his *judicial* capacity, and stewards and bailiffs of franchises, who are connected with him in his ministerial capacity only, are not even mentioned in the act. That statute requires him to send indictments taken before him in his tourn, to the justices of the peace at their next sessions, who are to issue process upon them, and forbids the sheriff to issue any such process. The text writers have taken occasion from hence to imply, upon very probable grounds, that this takes away the power of a sheriff to bail *ex officio*, as at the common law, which

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which power to bail they suppose to be inherent in the power to proceed; and from thence it was too hastily concluded, in the argument in this cause, that the sheriff's power to bail persons arrested upon indictments of trespass, under the statute 23 H. 6., which is not *ex officio*, nor at the common law, nor inherent in his *judicial* capacity, but wholly attached to his *ministerial* capacity, as I have before observed, was also by implication taken away. But so far is this consequence from being just, that I think it might be maintained, that in the case of a person arrested by virtue of process from the sessions, upon an indictment taken before the sheriff in his tourn, and removed according to the statute of 1 Ed. 4., though the sheriff could not bail him *ex officio*, he would be bound to bail him by the statute of 23 H. 6. Some passages in Mr. Serjeant *Hawkins's* book in his chapter upon bail, have been supposed to countenance this notion, that the statute of 1 Ed. 4. hath, by implication, taken away the sheriff's power to bail on indictment for trespass, by virtue of the statute of 23 H. 6. But if those passages are considered with their context, and with other passages upon the same subject, in 2 *Hale's Pleas of the Crown*, c. 17. it will manifestly appear that they have been misunderstood. The passage in *Hawkins* relied upon, was a part of the 27th section of c. 15. b. 2. title "*Bail*." I will barely state it with its context; it will speak for itself. "But it seems certain
" that by the common law the sheriff might bail any person
" who was indicted before him at his tourn, for felony or any
" other crime that isailable, because he might both award
" process and also give judgment against the person so in-
" dicted: and it is a general rule that whosoever is judge of
" the offence may bail the offender. But it is holden, that at
" this day, the sheriff has lost his power, by reason of 1 Ed. 4.
" c. 2., by which it is enacted, that the sheriff shall not proceed
" on any such indictment, but shall remove it to the next sessions
" of the peace." What is the power which *Hawkins* supposes the sheriffs to have lost by reason of 1 Ed. 4.? Evidently that power which he says the sheriff had at the common law, because he might award process. Having thus shewn what *Hawkins* has not said respecting the statute 23 H. 6., I will now state
[432] what *Fitzherbert* in his *Natura Brevium* has said, respecting the sheriff's taking bail on indictment of trespass. The passage I refer to is in fo. 565 of the edition by Sir *M. Hale*, upon which circumstance

circumstance I would observe, that the opinion of *Fitzherbert*, who wrote long after the passing of the act of 1 *Ed.* 4., for he was a judge of the Court of Common Pleas in the time of *Henry* 8., has in a degree the sanction of the whole intervening period between him and Sir *M. Hale*, who published his edition in the year 1660; for it can hardly be imagined, that if the law had been taken to be otherwise during any part of that period and particularly in Sir *M. Hale's* own time, that he would have suffered it to pass without observation. The passage is this, "If a man be sued in debt or trespass, and be arrested by *capias* or *exigent*, and kept in prison, he may sue a writ to the sheriff out of the Chancery, to take bail of him to appear at a day, &c. and that he set him at liberty, &c. But now by the statute made 23 *H.* 6. every sheriff is bounden to let to bail every one in his custody who is arrested by writ, bill or warrant, in any action personal, or upon indictment of trespass, if they offer reasonable sureties to appear at the day, &c., in such places where the writ, bill, &c. is returnable." The case cited at the Bar from the Year Book of 7 *Ed.* 4. *fo.* 5. *pl.* 15. which arose upon a bond for the appearance of a person arrested on an indictment for trespass, which was held to be void, because not made to the sheriff by his name of office, according to the statute of 23 *H.* 6., is a case in point against this extravagant notion of the effect of the statute of 1 *Ed.* 4., and affords a very strong inference that the statute 23 *H.* 6. was at that time understood to extend to indictments for trespass, and that it was the practice of the sheriff to take bail in that case. I have not been able to trace when it began to grow into disuse; I agree that it is now gone into disuse in a very great degree, and I conjecture that it could not have been in general use even in Sir *Edward Coke's* time, or at any time since; for I believe neither he nor *Hawkins*, when they are treating of bail in criminal cases, take the least notice of the statute of 23 *H.* 6. as applicable to the case of bail on indictment for trespass. Sir *M. Hale* does mention the statute, but passes it over without observation. Why it should have gone into disuse is very easily accounted for. Justices of the peace have authority by statute in some cases, in others, as incident to their judicial authority, to take bail, and to take bail by recognizance, which is more effectual than bail by obligation. The Court of King's Bench, and the individual judges of that court take bail, and the

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the application is now made to them. This disuse seems to have puzzled the framers of the 4 and 5 *W. & M. c.* 18. The statute of 23 *H. 6.* had excepted out of the number of persons to let out of prison, upon surety by that act, such as should be in ward by *capias utlagatum*. The statute of 4 and 5 *W. & M.* directs the sheriff to let one in ward by *capias utlagatum* out of prison, and it provides, that all persons outlawed in the Court of King's Bench, other than for treason or felony which must I think include outlawry on indictment for trespass, and arrested upon any *capias utlagatum* out of the said court, should be let out of prison by the sheriff upon surety. This is a repeal of the saving in 23 *H. 6.*, and seems to be an extension of the power given by that statute to the sheriff, to bail in the case of indictment for trespass. But then the statute proceeds to regulate the terms upon which the party is to be discharged, with reference to personal actions only, for the sheriff is to take an attorney's engagement to appear, or a bail bond, as it may happen to be a case where a special bail is or is not required. But let this non-user be of an old or a late date, will it repeal this statute of 23 *H. 6.*, as to bail on indictments, when as to every other part of it it is daily and hourly acted upon? Could it be said to the Court of Chancery, that it shall not issue the writ *de homine replegiando*, because the *habeas corpus* act has provided another and a better remedy, or that it shall not issue the writ *de manucaptione*, nor let a prisoner to mainprize, by its own immediate authority, because since the passing of this statute of 23 *H. 6.* it has not been the practice to apply to that court? If this is not to be said, I cannot discover upon what grounds of law this bond is to be impeached, unless a great deal more can be made than I conceive can be made in this case, or ought to be made in any case of the argument *ab inconvenienti*. Justices of the peace may be fitter to be trusted with a discretion, as to the quantity of security to be taken on indictment for trespass, than sheriffs. The judges of the Court of King's Bench, are in my judgment fitter to be trusted with such a discretion, and both justices of the peace and the judges take a better security than sheriffs can take. Let then the legislature, if the matter is of sufficient weight to merit its interposition, alter the law.

[434] When it was said, that the sheriff who cannot take a recognizance, and must take a bond, will put the money in his own pocket, if the party should not appear at the day, that the prosecutor

secutor will have no remedy, and that the public justice of the country will be defeated, I answer that this is not well understood. I take it, that as well in cases of arrest upon indictments for trespass, as personal actions, if the sheriff has let the party out of prison upon bail, he must return a *cepi corpus*; and when he has made that return, he is by the express words of the statute of 23 *H. 6.* in the 14th branch of the first section, chargeable to have the body of the person at the day of the return, according to the course of the court; if he has not the body to produce, I say that he is to be amerced, and being amerced he may then, and not till then, put the bond in suit to reimburse himself. This is laid down in *Dalton's Sheriff*, and this I take to have been the ancient course of proceeding in all cases where the sheriff had not the body ready after his return of *cepi corpus*, though I have not hitherto been able to trace when the mode of proceeding by attachment against the sheriff was first substituted in the room of the amercement (*a*). If this be so, the inconvenience is far less urgent than it was supposed to be; but more or less urgent, I am of opinion that it cannot repeal the statute of 23 *H. 6.*; that there is nothing to impeach the validity of this bond, and consequently that the judgment of the court of King's Bench is erroneous and ought to be reversed. But as the majority of the judges are of a different opinion, the judgment of that court must be affirmed.

Judgment affirmed.

(*a*) Though there are some instances of *attachments* being granted against sheriffs for a total disobedience to the king's writ, as in 43 *Ed. 5.* 26. *pl.* 5, and other books, yet where there was a return of *cepi corpus*, and the sheriff did not produce the Defendant, the mode of compelling him so to do, was an amercement, *Year Books*, 7 *Hen. 4.* 11. 11 *Hen. 4.* 57. 36 *Hen. 6.* 24. 27 *Hen. 8.* 29, cited Bro. Abr. tit. Amercement, 1 Roll. Abr. 93. *pl.* 17. 8 Co. 40 *b.* Cro. *Eliz.* 624, 808, 852. 1 Ventr. 55. 85. 2 Saund. 60. 3 Mod. 84. 3 Salk. 314. Dalton Sher. c. 37. Lilly's Prac. Reg. 83. Stat. 13 *Car. 2.* St. 2. c. 2. s. 3. This practice of amercing the sheriff appears to have continued from the earliest times down to the beginning of the reign of *Geo. 2.* and to have given way to the proceeding by attachment, at some period between

the years 1724 and 1729: for in Bohun, Instit. Leg. 24 and 25. third edit. 1724, an amercement is pointed out as the method to compel the sheriff to return the writ, and also to bring in the body, after being ruled, not a word being mentioned of an attachment for that purpose: in the Instr. Cler. B. R. 7th edit. 1727, vol. i. pp. 57, 58, an amercement is mentioned as the course usually pursued after ruling the sheriff to bring in the body; or after a *peremptory rule* an attachment, as being a more speedy way of proceeding. And in the case of *Smith v. Norton*, Mic. Geo. 2. 1729. 1 Barnardist. Rep. B. R. 246, on motion for an attachment for not bringing in the body after several rules, it is stated "that amercements only used to be the method of enforcing these rules, but lately they had granted attachments."

BROOKE

1795.

BENGOUGH
against
ROSSITER,
in Error.

[435]

1795.

Thursday,
Feb. 12th.

Where the Plaintiff in replevin pleads several pleas in bar of an avowry, on which issues are joined, and one of them is found for him, which establishes his right of action, and the others for the Defendant, and the judge does not certify under stat. 4 Anne, c. 16, the Defendant is intitled to the costs, not only of the pleadings which form, but also of the trial of those issues which are found in his favour (a).

BROOKE against WILLET.

IN this action of replevin (b), the declaration contained two counts, the first for taking sheep at the parish of *Mildenhall* in a place called *Undley Common*; the second, for taking them at the parish of *Lakenheath* in a place called *Undley Common*.

To the first count *non cepit* was pleaded, on which issue was joined, and found for the Defendant. To the second, avowry for damage-feasant to the Defendant's right of common for all commonable cattle, except sheep.

Pleas in bar, 1. A prescription for common for 20 sheep on the locus in quo, *viz.* *Undley Common*, on which issue was joined and found for the Plaintiff. 2. Common by cause of vicinage, on which the issue was found for the Defendant; and the judge did not certify that the Plaintiff had probable cause for pleading such matter, under 4 Anne, c. 16. And now a rule being granted to shew cause why the prothonotary should not tax the Defendant the costs of those issues which were found for him, and why they should not be deducted from the costs of that issue which was found for the Plaintiff, and also from the general costs of the cause to which the Plaintiff was intitled, by having one issue found in his favour, by which it appeared that he had a cause of action,

Le Blanc, Serjt., shewed cause. By the practice in this court the Plaintiff having obtained a verdict on any one issue, is intitled to the costs, not only of that, but also of all the others, though found for the Defendant. *Bull. N. P.* 335. *Mic.* 4 Geo. 3. *Bridges v. Raymond*, 2 Black. 800. *Norris v. Waldron*, *ibid.* 1199. This being the general rule, the next question is, in what manner the stat. 4 Anne, c. 16. is to be construed? That statute s. 4. enacts, "that it shall be lawful for any Defendant or tenant in any action or suit, or for any Plaintiff in replevin, with the leave of the Court, to plead as many several matters as he shall think necessary for his defence." And s. 5. provides, "that if any such matter shall upon a demurrer joined, be judged insufficient, costs shall be given at the discretion of the court; or if a verdict shall be found upon any issue in the said cause, for the Plaintiff or

(a) [Vide *Vollum v. Simpson*, 2 Bingh. 275. Tidd's Pr. 712. 8th edit.]
Bos. and Pull. 368. *Cook v. Green*,
5 Taunt. 594. *Othir v. Calvert*, 1

(b) *Ante*, 224.

Demandant,

Demandant, costs shall also be given in like manner, unless the judge who tried the said issue shall certify that the said Defendant or tenant, or *Plaintiff in replevin* had a probable cause to plead such matter which upon the said issue shall be found against him." Now it has been determined, that this statute extends only to the costs of the pleadings, and does not include those of the issues, *Page v. Creed*, 3 *Term Rep. B. R.* 391.

1795.

 BROOKE
 against
 WILLET.

Adair, Serjt., *contra*, urged the distinction taken in *Butcher v. Green*, *Dougl.* 677 (a) viz. that where the general issue only was pleaded, and a verdict found for the Plaintiff on some counts, and for the Defendant on the others, there the Defendant was not intitled to his costs on those counts which were found for him; but where different issues were joined on different pleas, there the Defendant was allowed the costs of the issues which were found in his favour. He also cited *Dodd v. Joddrell*, 2 *Term Rep. B. R.* 235. in which it was holden, that where some issues in replevin were found for the Plaintiff which intitled him to judgment, and others for the Defendant, the Defendant should be allowed the costs of those issues which were found for him, out of the general costs of the verdict, unless the judge should certify.

After time taken to consider, the court on this day declared that it appeared upon inquiry to be by no means the settled practice of the court of King's Bench to confine the statute 4 *Ann. c.* 16. to the costs of the pleadings in all cases, and that both on the words and spirit of the statute, and on principles of justice, the Defendant was entitled to have the costs allowed of the trial of the issue which was found for him, and not of the pleadings alone. The rule therefore was made absolute.

Rule absolute.

(a) 8vo Edition.

1795.

Thursday,
Feb. 12th.LATKOW *against* EAMER and BURNETT Sheriff of
Middlesex.

An inquisition made by the sheriff's jury to ascertain to whom the property of goods taken under *fi. fa.* belongs, though found in favour of *A.*, is not admissible evidence in an action of trover for the goods, brought by *A.* against the sheriff (a).

THIS was an action of trover, the circumstances of which were the following. The late sheriff had levied an execution at the suit of one *Barlow* on the goods of one *Martin*, the value of which, *Latkow*, in order to assist *Martin*, advanced to the officer in possession, but neither took a bill of sale, nor removed the goods from *Martin's* lodgings, in which they were taken. After this, another execution was levied by the present sheriff on the same goods, at the suit of one *Holbird* against *Martin*, upon which notice was given by *Latkow*, that he had purchased them under the former execution; notwithstanding which the sheriff removed them, and in consequence this action was commenced. After service of the writ, the sheriff summoned a jury to determine in whom the property of the goods was, who declared them to be the property of *Latkow*, *Holbird* being present at the inquisition. However, the sheriff being indemnified by *Holbird*, did not deliver up the goods to *Latkow*, who therefore proceeded in the action. At the trial, the inquisition was received in evidence by Mr. J. Buller, who sat for the Chief Justice, and who left it to the jury upon the whole of the case, to decide whether *Latkow* meant merely to redeem the goods for the use of *Martin*, or to become himself the real purchaser; and the verdict was found for the Defendants.

Clayton, Serjt., now moved for a new trial, on the ground that the verdict was contrary to evidence, contending that the inquisition on the claim of the property was conclusive evidence in favour of the Plaintiff as against *Holbird*, who was present at the time when it was made before the sheriff.

Lord Chief Justice EYRE. This proceeding of the sheriff could not be conclusive in any case, for inquests of office are always traversable. In trespass where the sheriff was the real Defendant, and not the nominal one, as in the present instance, such an inquisition would perhaps be evidence to lessen the damages, by a sort of *argumentum ad hominem* (b), but in the present case I doubt whether it can be evidence at all of pro-

(a) [So in *Glossop v. Pole*, 3 M. & S. 175, it was held that a similar inquisition was not evidence for the defendant in an action on the case against the Sheriff for a false return.]

(b) ["Perhaps it might be evidence if the question were whether the Sheriff had acted maliciously." *Per* Lord *Ellenborough*, *Glossop v. Pole*, 3 M. & S. 177.]

perty in a third person. I much doubt indeed, whether a sheriff can, strictly speaking, hold any inquisition as to property, except under a writ *de proprietate probandá*, in replevin.

BULLER, J. I have not been able to find any case in which this point has come in question. In *Dalton's Office of Sheriffs* (a), it is said, "the safest and surest course for the sheriff or officer to take, is to inquire by a jury, in whom the property of the goods is;" and this is repeated in *Impey's Sheriff* (b). The only case in which I have seen it mentioned is *Cooper v. Chitty* (c), where it is alluded to in the argument, but taken no notice of by the Court. But I think I ought not to have admitted the evidence at the trial, for the inquisition is not under the king's writ, but merely a proceeding by the sheriff of his own authority.

Rule refused.

(a) P. 146. *cap.* 30.

(b) P. 155.

(c) 1 Burr. 20. 1 Blac. 65.

1795.

LATKOW
against
EAMER.

CRAUFURD and Others Executors of Sir HEW CRAUFURD *against* CAINES.

Thursday,
Feb. 12th.

THE circumstances of this case were the following. *Anne* the wife of the Defendant was first married to *William Blomberg*, who left her at his death, lands in *Yorkshire* of the value of 1200*l.* a year, for her life. She afterwards married *Walter Nisbet*, which marriage was dissolved by an act of Parliament, by which the lands were confirmed to *Nisbet* during their joint lives, subject to a rent-charge of 200*l.* a year, which was thereby settled on the wife, during the same period. She then married the Defendant *Caines*, who together with her assigned the rent-charge to Sir *Hew Craufurd*, during the joint lives of *Nisbet* and her, and by the same deed covenanted to levy a fine of it, and further granted a rent charge to Sir *Hew* of the same sum for ninety-nine years, to be computed from the death of *Nisbet*, in case he should die in the life-time of *Anne*, if she should so long live, and also demised the lands to a trustee for a long term of years, to be computed in the same manner, in trust for the better securing the rent-charge. A fine *sur cognizance de droit tantum* was accordingly levied by

A fine levied of a rent-charge, assigned by way of annuity, will not give this court authority to set aside the annuity, securities, &c. on account of a defective memorial, there being neither a warrant of attorney to enter, nor judgment actually entered in this court.

1795. the Defendant and his wife, and he gave, as a farther security, a bond and warrant of attorney to confess a judgment in the Court of King's Bench. A motion was soon afterwards made in that court to set aside the annuity; but pending the rule, Sir *Hew* died, no judgment having been entered on the warrant. And now a rule was granted in this court to shew cause why the annuity should not be set aside, the deed, bond, &c. given up to be cancelled, and the fine vacated, on the ground that the memorial did not truly set forth the consideration, 1700*l.* being the sum stated to have been paid, when in truth part of it was kept back by Sir *Hew*, that the demise to the trustee was omitted, and no mention made of the fine or the covenant to levy it.

CRAUFURD
against
CAINES.

Adair, Serjt., shewed cause. 'This application, if made at all, ought to be to the Court of King's Bench, in which the warrant of attorney was given, and where a motion to this effect has been already made. The only part of the transaction of which this court can take cognizance, is the fine; but as that was regularly levied, and nothing appears to impeach its validity, it must stand. Another objection to the rule is, that this is one of the excepted cases in stat. 17 *Geo. 3. c. 26*, the eighth section of which enacts, that nothing in that act contained shall extend to any annuity granted "under any authority or trust, *created by Act of Parliament.*" But however that may be, it is obvious that nothing has been done in this case to give this court jurisdiction of the subject-matter. *Le Blanc*, Serjt., who was going to argue on the same side, was stopped by the Court.

Clayton, Serjt., *contra*. With respect to the objection, that the application ought to have been made to the Court of King's Bench, it is to be observed, that the warrant of attorney which was to confess a judgment, in an action at the suit of Sir *Hew Craufurd*, was at an end with his death. It would therefore be useless to apply to that court. The fine gives this court jurisdiction. It is an *assurance* according to the terms of the act, and comes within the principle of those cases in which a jurisdiction has been assumed, *Haynes v. Hare*, *ante*, vol. 1. 659. *Ex parte Chester*, 4 *Term Rep. B. R.* 694. A fine is also the sanction of the court to the agreement of the parties, where an *action* has been brought, and if there is good cause, they will

will order it to be vacated, *Cro. Eliz.* 531. *Hubert's case*, 3 *Leo.* 36. *Hutchinson's case*, 3 *Wils.* 115. *Watts v. Birkitt*. The memorial is defective *in not stating the consideration truly, and also in omitting to state the levying of the fine, which was in the nature of a fresh grant, distinct from the assignment, and which alone conveyed the interest of the wife. And the memorial being void in part, is void in the whole. As to the argument, that this is one of the excepted cases in the statute 17 *Geo.* 3. c. 26, it must be remembered that the annuity in question as far as it respects Sir *Hew Craufurd*, was not created by the act for dissolving the marriage between *Nisbet* and the wife of the Defendant.

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CRAUFURD
against
CAINES.

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The Court without giving any decided opinion, as to the alleged defects in the memorial, held that as there was neither a judgment nor warrant of attorney in this court, they had no jurisdiction of the matter in question; that the fine did not give them jurisdiction, for it was not an action within the meaning of the 4th section of the statute, nor was it such an assurance as was meant by the 3d section; and that as there was no intrinsic defect in it, or irregularity in the mode of levying it, they had no authority to interfere, and order it to be vacated.

Rule discharged.

VAUGHAN *against* DAVIES.

Thursday,
Feb. 12th.

THE Plaintiff recovered a verdict for 200*l.* against the Defendant in an action of trespass for taking his goods, and the Defendant had previously obtained judgment against the Plaintiff on a bond for 2000*l.* who was surrendered in execution of that judgment. And now on the motion of *Bond*, Serjt., a rule was granted to shew cause why it should not be referred to the prothonotary to take an account of the damages recovered on the verdict obtained by the Plaintiff, and tax his costs thereon, and why the Defendant should not be discharged

A. having obtained a verdict against *B.* for a small sum, and *B.* having previously recovered judgment against *A.* for a larger sum, and taken him in execution,

the Court will permit the sum recovered by *A.* by the verdict and the costs to be deducted from the amount of the judgment of *B.*, and satisfaction to be entered for so much, notwithstanding *A.* is insolvent, and has no means of paying his *Attorney's bill*, but by the sum for which he obtained the verdict (*a*).

(a) [Vide *ante*, vol. 1. p. 23. note.]

from

1795. from the payment of such damages and costs, when so ascertained and taxed, upon his entering satisfaction for the amount * thereof on the judgment recovered by him, in part discharge of that judgment, 2 *Black.* 826. *Thrustout v. Crafter*, ante, vol. 1. 23. *Schoole v. Noble*, 217. *Nunez v. Modigliani*, 657. *O'Connor v. Murphy*.

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VAUGHAN
against
DAVIES.

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Adair, Serjt., shewed cause on the part of the attorney for the Plaintiff, on affidavits stating that he had no fund to resort to but the sum recovered by the Plaintiff for the payment of his bill, the Plaintiff himself being insolvent; the set-off therefore ought not to be allowed till the attorney's bill was satisfied. He said that the Court would protect an attorney who was their officer, who would otherwise be without remedy, and that in the Court of King's Bench the equitable right of setting off the sum recovered in one action against that recovered in another, was always subject to the attorney's lien for his bill, for which he cited *Mitchell v. Oldfield*, 4 *Term Rep. B. R.* 123. and *Morland v. Lashley*, *B. R. Trin.* 34 *Geo.* 3. (a). But

On this day after consideration, the Court said that the at-

(a) *Morland and Hammersley v. Lashley. Same v. Lashley & Ur.*

Both these causes were tried at the sittings *Trin.* 34 *Geo.* 3. The first was an action upon the separate bond of the Defendant; the second upon the joint bond of the Defendant and his wife. In the first, the Plaintiff obtained a verdict, and in the second was nonsuited. In the same term *Henderson* on the part of the Plaintiff obtained a rule to shew cause why the costs of the nonsuit should not be deducted from the sum given by the verdict in the first cause.

Palmer shewed cause, contending on the authority of *Mitchell v. Oldfield*, 4 *Term Rcp. B. R.* 123, that the attorney for the Defendants had a lien on the judgment for his costs. In support of the rule *Henderson* cited *Barker v. Braham*, 3 *Wils.* 396, and attempted to distinguish the present case from *Mitchell v. Oldfield*, because there were different attorneys in the different causes in that case, but here the attorney was the same in both. But

Lord KENYON said, that circumstances made no difference between the cases; and as to the case in *Wilson*, it did not there appear that any application was made on the part of the attorney. That an attorney had a lien on the judgment for his costs, which it would be unjust in the Court to take from him. The rule therefore was made absolute, with a reservation of the attorney's lien. But as his costs were equal to the costs of the nonsuit, the rule was afterwards abandoned *.

* See also 6 *Term Rep. B. R.* 456. *Randle v. Fuller*.

torney's lien did not extend to prevent the parties in the cause from having the benefit of the set-off which was applied for in this case, and therefore made the

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VAUGHAN
against
DAVIES.

Rule absolute.

BULLER, J., mentioned that a similar decision had taken place this term in the Court of *Chancery*, in a case of *Barton v. Etherington*.

END OF HILARY TERM.

IN

IN THE COMMON PLEAS.

Hilary Term, in the Thirty-fifth Year of the Reign of King
GEORGE the Third.

IT IS ORDERED, That upon all Process sued out of this Court, returnable the last Return of any term, if the Plaintiff declares in *London* or *Middlesex*, and the Defendant lives within Twenty Miles of *London*, the Defendant shall plead within Four Days after such Declaration filed or delivered, with Notice to plead accordingly, without any Imparlane, provided such Declaration be filed or delivered on the Day of such Return, [or on the Day next after the same, unless such Return Day shall happen on a Saturday, in which case the Plaintiff shall have the Whole of the Monday following] (a) to file or deliver such Declaration as aforesaid. And in case the Plaintiff declares in any other County, or the Defendant lives above Twenty Miles from *London*, the Defendant shall plead within Eight Days after the Declaration filed or delivered, with Notice to plead accordingly, without any Imparlane, provided such Declaration be filed or delivered as aforesaid. AND IT IS FURTHER ORDERED, That the Rules now in force respecting the Times of declaring and pleading upon any process returnable the First, Second, or Third Return of any Term, shall also extend to the Fourth Return of Easter Term.

JA. EYRE. J. HEATH.
F. BULLER. G. ROOKE.

(a)[In a copy of the order verbatim, as signed by the Judges, taken from a copy in the possession of Mr. Secondary *Griffiths*, see 2 Marsh. 338 (n) the words between brackets are omitted, and in their place are inserted the following words [or on the day next after such return, in case the same shall not happen on a Sunday, in which case the Plaintiff shall have

the whole of the day following]. In Peacock's Collections of the Rules and Orders of the Common Pleas, the passage is [or on the day after such return, in case the same shall happen on a Sunday] which, it has been observed, conveys a directly contrary meaning to that intended. See 2 Marsh. *ubi sup.*

Hilary Term, in the Thirty-fifth Year of the Reign of King
GEORGE the Third.

IT IS ORDERED, That after the first Day of the next Term, no Judgment shall be signed for non-payment of Issue Money; but that the Issue Money shall remain to be taxed as part of the Costs in the Cause.

JA. EYRE. J. HEATH.
F. BULLER. G. ROOKE.
CASES

C A S E S

ARGUED AND DETERMINED

1795.

IN THE

Courts of COMMON PLEAS

AND

EXCHEQUER CHAMBER,

IN

Easter Term,

In the Thirty-fifth Year of the Reign of GEORGE III.

MORLEY *against* GAISFORD.

Monday,
April 27th.

THIS was an action on the case, and the declaration, which consisted of only one count, stated that the Plaintiff “on,
“ &c.

An action
on the case,
and not an
action of
trespass, is

the proper remedy for an injury done to the Plaintiff's carriage by the servant of the Defendant negligently driving *his* carriage against it (a).

(a) [So where the Plaintiff declared in case that *A.* so negligently steered his vessel, that it ran foul of *B.*'s, the declaration was held proper, *Ogle v. Barnes*, 8 T. R. 188. And where the Plaintiff declared in case against the Defendant for sinking his boat, and after averring a non-feazance in the Defendant, stated him to have acted with great *force* and violence; on error brought, it was held, that the Plaintiff had declared rightly in case, *Turner v. Hawkins*, 1 Bos. & Pul. 472. Again, where the declaration was for driving the Defendant's cart against the Plaintiff's horse with force and violence, alleging it to have been done “by and through the mere negligence, inattention, and want of pro-

per care” of the Defendant, the Court of Common Pleas on demurrer held, that case was the proper form of action, *Rogers v. Imbleton*, 2 Bos. & Pul. N. R. 117. So in *Huggett v. Montgomery*, Id. 446. the same Court held, that if one ship run against another by the negligence of the pilot while the owner is on board, the remedy against the owner is an action on the case. So also, where an action in case was brought against three Defendants, and the declaration stated that the Defendants so carelessly managed their coach and horses, that the coach ran against the Plaintiff and broke his leg; and it appeared in evidence that one of the Defendants was driving at the time

1795. " &c. at, &c. was lawfully possessed of a certain carriage called
 MORLEY " a chaise, and of a certain horse then and there drawing the
 against " same; and the Defendant was then and there also possessed
 GALSFORD. " of a certain cart and a certain horse, then and there drawing
 " the said cart, and then and there by a certain then servant
 " of him the said Defendant, had the care, conduct, and
 " management of the said horse and cart of the said Defend-
 " ant, and of the driving thereof, to wit, at, &c. yet the said

time when the accident happened, and the jury found that it happened through his negligent driving, it was held, that the Plaintiff might maintain case against all the proprietors, although he might perhaps have been entitled to bring trespass against the one that drove the coach, *Moreton v. Hardern*, 4 B. & C. 223.

On the other hand, in *Leame v. Bray*, 3 East, 593. an action of trespass against the Defendant for accidentally driving his carriage against another's, was held rightly brought; and in *Covell v. Laming*, 1 Campb. N. P. C. 497. it was held, that if the owner of a ship being himself on board, and standing at the helm, unintentionally runs her against another ship by unskilful management, trespass is maintainable. So in *Lotan v. Cross*, 2 Campb. N. P. C. 464. where the Defendant had run against and injured the Plaintiff's chaise, Lord *Ellenborough* held, that trespass was the proper remedy. So also, where the Defendant drove a chaise against another chaise, in which the Plaintiff's wife was then riding, whereby she sustained an injury, the Court of Common Pleas held, that the action was rightly brought in trespass by the husband and wife, *Hopper and Wife, v. Reeve*, 1 B. Moore, 407.

Upon the whole, the following distinctions seem deducible from the cases on this subject.

I. Where the injury arises from the *negligence* of the Defendant, and the act is at the same time *immediate*, as where the Defendant by negligent driving runs against the Plaintiff's carriage, the Plaintiff may maintain case for the negligence, waiving the trespass. As to the latter point, see *Hall v. Pickard*, 3 Campb. N. P. C. 188. where it is said by Lord *Ellen-*

borough, that it may be worthy of consideration whether in those instances in which trespass may be maintained, the party may not waive the trespass and proceed for the tort: see also *Branscomb v. Bridges*, 1 B. & C. 145. So it is said by *Bayley, J.*, in observing upon the case of *Leame v. Bray*, that " at the trial Lord *Ellenborough* thought it should have been case, but on further consideration, the Court was of opinion that trespass was maintainable, *but they did not decide that an action on the case would have been improper.*" *Moreton v. Hardern*, 4 B. & C. 226. But instead of waiving the trespass, the Plaintiff may, if he please, proceed for the immediate injury, and bring an action of trespass.

II. Where the injury arises from the *negligence* of the Defendant's servants, case only, and not trespass, is maintainable against the master.

III. Where the injury arises not from the *negligence* of the Defendant, but the act is both *wilful* and *immediate*, trespass is the proper form of remedy.

IV. Where the injury is *not immediate*, but only *consequential* upon the act done, the remedy is case, and not trespass.

V. Where the Plaintiff is the owner, but not entitled to the immediate possession of a chattel, injured by the Defendant driving violently against it, case, and not trespass, must be brought, *Hall v. Pickard*, 3 Campb. N. P. C. 187. But a mere gratuitous permission to a third person to use a chattel, does not take it out of the possession of the owner so as to prevent him from maintaining trespass for an injury done to it while it is so used. *Lotan v. Cross*, 2 Campb. N. P. C. 464.]

" Defendant

“ Defendant by his said servant then and there so negligently
 “ and unskilfully managed and behaved himself in the pre-
 “ mises, and so badly, ignorantly, and negligently, drove, ma-
 “ naged, guided, and governed the said cart and horse of the
 “ said Defendant, that the said cart for want of good and suf-
 “ ficient care and management thereof, and of the said horse
 “ so then and there drawing the same as aforesaid, then and
 “ there struck and ran to and against the said chaise of the
 “ said Plaintiff with great force and violence, and then and
 “ there pulled, forced, and dragged the same to a great distance,
 “ and then and there broke to pieces, destroyed, and damaged
 “ the said chaise, and one of the wheels of the said chaise,
 “ and the shaft thereof, to wit, at, &c. whereby the said chaise
 “ of the said Plaintiff then and there became and was crushed,
 “ broken, damaged, and injured, and he the said Plaintiff was
 “ forced and obliged to lay out and expend, and did lay out
 “ and expend a large sum of money, to wit, the sum of 30*l.* in
 “ and about the repairs and amendment thereof, to wit, at, &c.
 “ to the damage, &c.”

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A verdict having been found for the Plaintiff, *Cockell*, Serjt., now moved in arrest of judgment on the ground that the action ought to have been trespass, and not case, as the injury was direct, and not consequential. It was not necessary, he said, that the act done should be unlawful, to make it a ground of trespass; as if a man lift up a stick to defend himself, and by accident strike another, there, though the act was lawful, yet trespass lies. *A fortiori* therefore where the act is unlawful, as in the present instance, trespass is the proper remedy. And he cited *Day v. Edwards*, 5 *Term Rep. B. R.* 648. and *Savignac v. Roome*, 6 *Term Rep. B. R.* where the ground of the decision was, not that the act was wilful, as the counsel contended, but that there was a direct, and not a consequential injury.

The Court seemed at first inclined to refuse the rule, saying that it was difficult to put a case where the master could be considered as a trespasser for an act of his servant (*a*), which was not done at his command; but they said, that respect for the decisions of the Court of King's Bench would induce them to give the point farther consideration, and accordingly, a rule

(*a*) [That a master is not liable in trespass for the wilful act of his servant, though he is answerable in an action on the case for his negligence, *vide M'Manus v. Crickett*, 1 East, 106. *Leame v. Bray*, 3 East, 601.]

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to shew cause was granted ; but a few days afterwards, *Cockell* acknowledged that the rule could not be supported, in which the Court concurred, being clearly of opinion that case, and not trespass, was the proper form of action.

Rule discharged.

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Tuesday,
 April 28th.

SMITH and Others, Assignees of EUSTACE,
 a Bankrupt, against COFFIN and Ux.

A. by his will reciting " as to such worldly estate as God has pleased to bless me with " made a provision for his heir at law, and " devised all the rest and residue of his goods, chattels, rights, credits, personal and testamentary estate whatsoever to B. for his own use, benefit, and disposal." Under this clause, B. took an estate in fee in the lands of the testator (a). The right to bring a real action, *ex. gr. a writ of entry sur abatement*, passes to the assignees of a bankrupt, by the usual words of the deed of assignment (b).

THIS was a writ of entry *sur abatement*, and the count was as follows (c).

" County of the City of *Exeter*, to wit, *Henry Smith, Joseph Hunt, and William Spicer*, assignees of the estate and effects of *Thomas Eustace* deceased, a bankrupt, according to the form of the statutes made concerning bankrupts, by *Nathaniel Batten* their attorney, demand against *Edmund Coffin* and *Sarah* his wife, one messuage with the appurtenances, and six acres of land in the parish of *Saint Sidwell* in the County of the City of *Exeter*, which they claim to be their right and inheritance as such assignees as aforesaid, and into which the said *Edmund* and *Sarah* have not entry, but by *Hannah Eustace*, who devised the said tenements with the appurtenances to the said *Edmund* and *Sarah*, and who unjustly abated into the same after the death of *Thomas Eustace* father of the said *Thomas Eustace* the bankrupt, who was heir of the said *Thomas Eustace* the father within fifty years now last past, and thereupon the said *Henry Smith, Joseph Hunt, and William Spicer*, assignees as aforesaid, say that the said *Thomas Eustace* the father was seised of the tenements aforesaid, with the appurtenances in his demesne as of fee and right, in time of peace, in the time of our lord the now king, to wit, within fifty years last past, by taking the esplees thereof to the value, and on the first day of *June* in the year of our Lord 1767, died so seised thereof, upon whose death the said *Hannah Eustace* abated into the said tenements with the appurtenances, and was seised thereof, and died so thereof seised on the 12th day of *December* 1792, and from the said *Thomas*

(a) [Vide *Dally v. King*, ante vol. I. page 1. and the note there.]

(b) [Vide *Clarke v. Calvert*, 8 Taunt. 750. 3 B. Moore, 111. S. C.]

(c) Which not being in daily practice, is stated at length.

" *Eustace*

“ *Eustace* the father, the right descended to the said *Thomas*
 “ *Eustace* the bankrupt, then being of the age of sixteen years, as
 “ son and heir of the said *Thomas Eustace* the father, and remain-
 “ ed and continued in the said *Thomas Eustace* the bankrupt, till
 “ the time of his bankruptcy hereinafter mentioned.” It was then
 stated, that after the right so descended to the said *Thomas Eus-*
tace the bankrupt as aforesaid, and while the same so as aforesaid
 remained and continued in him, to wit, on the 25th of *March*
 1774, he was a trader, and became a bankrupt on the 3d *Fe-*
bruary 1789. The issuing the commission, and the proceedings
 under it were then set forth, the assignment by the commis-
 sioners being stated to have been made by an indenture of bar-
 gain and sale, by which they did “ order, grant, bargain and
 “ sell, unto them the said *Henry Smith, Joseph Hunt* and *Wil-*
liam Spicer, their heirs and assigns, all and singular the mes-
 “ suages, lands, tenements and hereditaments, whatsoever and
 “ wheresoever, of or belonging to the said *Thomas Eustace* the
 “ bankrupt, in fee simple, fee tail or for life, or otherwise, with
 “ their respective rights, members and appurtenances, and all
 “ the estate, right, title, interest, property, profit, benefit, and
 “ equity of redemption, claim and demand, whatsoever, which
 “ he the said *Thomas Eustace* the bankrupt at the time of his
 “ becoming bankrupt as aforesaid, had of, in or to all and sin-
 “ gular the said messuages, lands, tenements and hereditaments,
 “ respectively, to have and to hold all and singular the said
 “ messuages, lands, tenements and hereditaments, with their
 “ and every of their rights, members and appurtenances, unto
 “ them the said *Henry Smith, Joseph Hunt* and *William Spicer*
 “ (the assignees), their heirs and assigns, to and for the only
 “ benefit and advantage of them the said *Henry Smith, Joseph*
Hunt and *William Spicer*, their heirs and assigns for ever, or
 “ according to the said *Thomas Eustace* the bankrupt’s right
 “ and interest therein, subject to such mortgage or mortgages,
 “ or other charges and incumbrances, if any such there should
 “ be, as the same were rightfully charged with and liable to, in
 “ trust nevertheless, &c.” (a) It was then stated that the bank-
 rupt obtained his certificate, and afterwards died: “ and so the
 “ right of the said *Thomas Eustace* the bankrupt of and in the

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(a) This deed appears to be in the usual form used by commissioners of bankrupts, but as stress was laid up-

on it in the argument, it is particularly stated.

“ tenements

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 “vested in the said *Henry Smith, Joseph Hunt* and *William*
 “*Spicer*, as such assignees as aforesaid, who now demand the
 “same as such assignees aforesaid, and into which, &c. and who
 “after the death, &c., and therefore they bring suit, &c.”

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The Defendants came and defended their right when, &c. and pleaded, 1st. That *Thomas Eustace* did not become a bankrupt; on which issue was joined. And 2dly, by leave of the Court, &c. that the said *Thomas Eustace* the father being seised in fee of the tenements aforesaid, made his will, and thereby devised the said tenements, with the appurtenances, to his wife the said *Hannah Eustace* in fee, and died; by virtue of which devise she the said *Hannah*, after the death of the said *Thomas Eustace* the father, entered into and was seised in fee of the premises, and being so seised, before the intermarriage of the said *Edmund* and *Sarah*, duly made her will, and devised the said tenements, with the appurtenances, to the said *Sarah Coffin*, by her then name and description of her daughter *Sarah Eustace*, her heirs and assigns for ever, and afterwards, and after the intermarriage of the said *Edmund* and *Sarah* died so seised. By virtue of which said devise the said *Edmund* and *Sarah*, in right of the said *Sarah*, after the death of the said *Hannah*, to wit, on the same day and year last aforesaid, entered into the said tenements, with the appurtenances, and became and were, and continually from thence hitherto have been, and still are seised thereof, in their demesne as of fee in right of the said *Sarah*, &c.

The replication, as to so much of the plea as related to the messuage with the appurtenances, part of the tenements in the declaration mentioned, was that *Thomas Eustace*, the father, did not devise the same to his wife *Hannah Eustace* and her heirs, *modo et formá*, &c., on which issue was joined. And as to so much of the plea as related to the six acres of land, residue of the tenements, &c., that *Thomas Eustace* the father, at the time of making his will, was not seised in fee of those six acres, &c., on which also issue was joined.

This cause was tried at *Exeter*, at the Summer Assizes 1794, when the only question left to the jury was, whether *Thomas Eustace* the son committed an act of bankruptcy, which was found in the affirmative, every other fact respecting the first issue being admitted. It was also agreed that a verdict should be

be taken for the Plaintiffs on the third issue, and the following case made for the opinion of the court, on the second.

Thomas Eustace the father, being seised in fee of the messuage in *Saint Sidwell's* mentioned in the declaration, and also having an interest in a house in another parish, in which he then lived, made his will bearing date the third day of *May*, 1763, in the following words; “ As to such worldly estate, as
 “ God in his kind providence has been pleased to bless and
 “ favour me with, I give and dispose of the same in manner
 “ and form following, that is to say; First, I give and be-
 “ queath unto my son *Thomas Eustace* the sum of two hundred
 “ pounds of lawful money of *Great Britain*, to be paid unto
 “ him out of my residuary estate and effects, by my executrix
 “ hereinafter named, when and if he shall attain the age of
 “ twenty-one years; but my will is, that if he shall happen to
 “ die under that age, that the said sum of two hundred pounds
 “ shall sink in my residuary estate, for the benefit of my said
 “ executrix. Also my will is, that my said son shall as soon
 “ after my decease, as my said executrix shall think fit and con-
 “ venient, be by her placed and bound out to some trade, pro-
 “ fession or business, and that she do and shall by and out of
 “ my said residuary estate, pay the consideration-money to be
 “ paid or given with him on that occasion, and also provide
 “ for, maintain and educate my said son, until he shall be so
 “ placed and bound out as aforesaid, in a decent and suitable
 “ manner, and during the time of such his apprenticeship, and
 “ until he shall attain his said age of twenty-one years or die,
 “ which shall first happen, find and provide for, and allow
 “ and give unto him proper and suitable cloaths, and wearing
 “ apparel, and all other necessaries whatsoever, except such
 “ as the master with whom he may be placed and bound out,
 “ shall in and by the indenture of apprenticeship for that pur-
 “ pose to be made and executed, covenant and agree to pro-
 “ vide, it being my express will and intention, that my said
 “ son shall be as much the object of my said executrix's care,
 “ as he would have been of mine had I been living, to educate,
 “ provide for and maintain him. Also *all that my messuage,*
 “ *tenement or dwelling-house, wherein I now live,* with the ap-
 “ purtenances and the reversions, remainders, rents, issues and
 “ profits thereof, (subject nevertheless with my personal estate,
 “ to the payment of the said legacy of two hundred pounds to
 “ my

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“ my son, when and if he shall attain his said age of twenty-
 “ one years as aforesaid,) I hereby give and devise unto my
 “ dear wife *Hannah Eustace* her heirs and assigns for ever,
 “ also all the rest and residue of my goods, chattels, rights,
 “ credits, personal and *testamentary estate* whatsoever, where-
 “ soever, and in whose hands soever, not hereinbefore parti-
 “ cularly given and bequeathed, (subject nevertheless to the
 “ payment of the said legacy of two hundred pounds to my said
 “ son, and to such provision for binding out, maintaining and
 “ educating him as aforesaid, and also to the payment of all
 “ my just debts and funeral expences, to and with the payment
 “ whereof, I hereby subject and charge the same,) I hereby
 “ give and bequeath unto my said dear wife *Hannah Eustace* for
 “ *her own use, benefit and disposal*. Lastly, I hereby make, or-
 “ dain, nominate and appoint my said wife *Hannah Eustace*,
 “ whole and sole executrix of my last will and testament.”

In *June* 1763 the testator died, and his widow *Hannah Eustace* entered into possession of the house in *St. Sidwell's* by virtue of the residuary clause in the will, and received the rents and profits until her death. And the question for the opinion of the court was,

Whether she took any, and what estate in the said messuage in *St. Sidwell's* under the will? If the court should be of opinion that she took an estate in fee, a verdict to be entered for the Defendants on the second issue; if she took no estate, or only an estate for life, the verdict on that issue to be entered for the Plaintiffs.

This question was argued in *Hilary* Term, by *Le Blanc*, Serjt., for the Plaintiffs in the following manner. On the true construction of this will, *Hannah Eustace* took no estate in the house in *St. Sidwell's*. The facts are that the testator had two houses, one in *St. Sidwell's*, and another in which he lived. But he makes no mention of that in *St. Sidwell's* in any part of the will, it therefore could not pass to the wife unless it be included in the residuary clause. But the court will not disinherit the heir at law, without seeing a clear expression of the intention of the testator that some other person should take the inheritance. Though it be true that where a legacy is given to the heir at law, an intention may be presumed in the testator, that he should not inherit, yet that circumstance will not be sufficient to exclude him unless the estate is expressly devised

devised to somebody else, notwithstanding the introductory part of the will refers to all the *estate* and effects of the testator, according to the rule laid down by Lord *Mansfield* in *Denn v. Gaskin*, *Cowp.* 657, and in *Shaw v. Russell* there cited. To the same point also is *Right v. Sidebotham*, *Dougl.* 759, 8vo. The question then is whether the words “all the rest and residue of my *testamentary* estate,” used in the residuary clause, contain such an express devise to the widow, as will exclude the heir? Now when the testator devises the house in which he lived to her, he uses legal phrases in order to give her an estate in fee, he describes it as the house in which he lived, and gives it to “her heirs and assigns for ever.” It appears therefore that he knew the force of technical expressions, and it is to be presumed, that if he had meant that she should take the house in *St. Sidwell’s*, he would have described that house in the same manner. But the words *testamentary estate* are peculiarly applicable to personal property, and they are here coupled with the words “*goods, chattels, rights and credits*,” which are expressive of that species of property alone.

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Williams, Serjt., *contra*. Though the introductory clause mentioning *all the testator’s worldly estate*, taken by itself proves nothing, yet when connected with the rest of the will, it affords a good ground on which to reason in favour of the devisee. 2 *Vern.* 690, *Beachcroft v. Beachcroft*. *Cas. Temp.* *Talbot*. 157, *Ibbetson v. Beckwith*. 1 *Wils.* 333, *Grayson v. Atkinson*. 3 *Purr.* 1618, *Frogmorton v. Holyday*. *Cowp.* 299, *Hogan v. Jackson*.

As to the case of *Denn v. Gaskin*, Lord *Mansfield* there makes a distinction between cases where the testator connects the introductory clause “as to all his worldly estate” with the particular devise, and where there is no such connexion; and neither in that case, nor that of *Shaw v. Russell*, was there any such connexion; but there is in the present. In those cases too, there was a mere formal bequest to the heir at law, of 10s. in one, and 1s. in the other, therefore no provision was made for him; but here, besides a legacy of 200*l.*, express directions are given to defray the expences of apprenticing and maintaining the heir out of the residuary estate. It does not appear therefore that the testator meant to give him a larger share of any of his property. If he dies under 21, the legacy of 200*l.* is to *sink* into the *residuary estate*. Now the term *sink into the*

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estate is peculiarly applicable to land, and is accordingly used in marriage settlements when the portions of younger children who may die under age are not to be raised. And the word “*estate*”, though coupled with expressions applicable to personal property, will pass a fee. 2 *Term Rep. B. R.* 659, *Tilly v. Simpson* (a).

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It is also a rule of law, that every word in a will shall be effective if possible. But unless the word *testamentary* be here understood to relate to land, it will be useless, for the other words are fully sufficient to pass all the personal property of the testator. In ancient times no man could dispose of his real estate by will. By degrees that privilege was allowed; as for instance, by the custom of particular towns. It was not till the passing of the statute 32 *Hen. 8. c. 1*, that a free disposition by will of lands was allowed. But that statute and the 34 and 35 *Hen. 8. c. 5*, both use the terms *will* and *testament* as synonymous. Where the intention also of the testator is to be collected from the context, even the word *legacy* will pass a real estate. 1 *Burr.* 268, *Hope v. Taylor.* 5 *Term Rep. B. R.* 716, *Hardacre v. Nash.* Here too the residuary bequest is charged with the payment of debts, the real estate therefore ought to pass for the benefit of creditors. And that the residuary clause in the will in question is sufficient to include a devise of land, appears from 1 *Com. Rep.* 164, *Hopewell v. Ackland.* *Ibid.* 337, *Scott v. Alberry.*

BULLER, J.(b) Cases of this sort depend on niceties of expression, and sometimes even on a single word, and as it has been frequently said, the nonsense of one man cannot be a guide for that of another. But the question always must be, what was the intention of the testator? That is the polar star by which we must be guided. Where it is apparent in the introductory part of the will, that the testator meant to dispose of the whole of his property, and the expressions in the residuary clause *may* include a real estate, that clearly is to be taken in the largest sense, in order to correspond with the introductory part. This case is different both from *Denn v. Gaskin* and *Shaw v. Russell*, for in neither of those cases did the introductory clause profess to dispose of all the property of the testator. That circumstance distinguishes this case, and brings it within

(a) On this point see likewise *Doe v. Chapman, ante*, vol. i. 223.

(b) Absent the Lord Chief Justice.

the authority of that of *Grayson v. Atkinson*, before Lord *Hardwicke*, where the introductory clause was, “as to all my temporal estate wherewith it hath pleased God to bless me, I give and devise the same as follows.” Here the testator meant to devise all his property; the word *testamentary* is as well applicable to real as to personal estate; and if it be not applied in this case to the real property, it is merely tautologous; and in construing wills the Court will, if possible, give a meaning to every word. I am therefore of opinion that there should be judgment for the Defendant.

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HEATH, J. I am of the same opinion, and my reasons are [451] these: first, The testator sets out with declaring his intention to dispose of all his property; secondly, he leaves 200*l.* to his heir at law; and thirdly, the residuary clause is sufficient to pass the estate in question; for the word *testamentary* is a most comprehensive term, and we should interpret it in much too narrow a sense, if we were to confine it to personal property. And there are no circumstances in the will to control this body of evidence, if it may be so called. Wills are frequently made *in extremis*, sometimes when the agonies of death are approaching, and it would be unfair to construe strictly the words used by an ignorant testator in that situation. Here, after the devise of the personal estate he might have changed his mind, and designed to give also his real estate, by the residuary clause. The word *testamentary* may therefore be considered as declaratory of a subsequent intention to that effect.

ROOKE, J., of the same opinion.

Postea for the Defendant.

The Court having thus given their opinions on the construction of the will, *Williams*, Serjt., afterwards obtained a rule to shew cause why the judgment should not be arrested, on two grounds: first, that a right of action to recover real property was not such an interest as would pass by the assignment of the commissioners to the assignees of the bankrupt; and secondly, that if it were such an interest as was assignable, yet it did not pass by the deed which was executed in the present instance.

Against which *Le Blanc*, Serjt., now shewed cause. The first question is, whether a right of action to recover real property is of such a nature as to be capable of vesting in the assignees of a bankrupt by the assignment of the commissioners? Now

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the *stat. 13 Eliz. c. 7.* enables the commissioners to dispose of whatever property or interest the bankrupt “*may lawfully depart withal*”; but this was an interest which the bankrupt might have released, therefore he might have departed with it. The *5 Geo. 2. c. 30.* goes farther, and mentions “all such effects of which the party was possessed or interested in, or whereby he hath or may expect any profit, possibility of profit, benefit or advantage whatsoever.” And it has been decided that a possibility may be devised and is assignable. *Roe on dem. Perry v. Jones, ante vol. 1. 30.* affirmed in error, *3 Term Rep. B. R. 88.* The statute also *21 Jac. 1. c. 19.* declares that all the statutes and laws concerning bankrupts shall be largely and beneficially construed, for the relief of creditors. Here the right descended to the bankrupt before the bankruptcy, and if it do not pass to the assignees, it must still remain in him, in opposition to the claims of his creditors, a position contrary to all legal notions of the effect of an assignment by the commissioners, which passes every thing vested in the bankrupt. And upon this principle Sir Joseph Jekyll founded his decision, in *Higden v. Williamson, 3 P. Wms. 132.*

Taking then this right to have been assignable by the commissioners, the next point is, that it passed by the deed in question. The material words are “*hereditament, claim and demand.*” Now it clearly was included in one or other of those terms; a right of action was considered as an hereditament in the Marquis of Winchester’s case, *3 Co. 1.*; and though in *Cromer’s* case there cited, *p. 4 b.* such a right was holden not to pass by the Queen’s grant on the attainder of a disscisee, yet that case proceeded on the principle that the grant of the crown shall be strictly construed, and shall pass nothing but what is specifically described; but a rule of construction directly contrary prevails in cases of bankrupts.

In support of the rule, *Williams, Serjt.*, argued in the following manner.

The facts stated and admitted on this record are these:—*Thomas Eustace* the father was seised in fee of the lands in question, and died so seised on the 1st of *June 1767*, leaving *Thomas Eustace* his son then of the age of 16 years his heir at law. Upon the death of *Thomas Eustace* the father, *Hannah Eustace* abated into the premises, and was seised thereof, and died so seised on the 12th of *December 1792.* On the 3d of *February*

bruary 1789, *Thomas Eustace* the son became a bankrupt, a commission of bankrupt duly issued against him, and the commissioners by indenture of bargain and sale, bearing date the 24th of *March* 1789, duly inrolled, did order, grant, bargain and sell, unto the demandants, the assignees, “all and singular the *messuages, lands, tenements and hereditaments*, whatsoever and wheresoever, of and belonging to the said bankrupt in fee simple, fee tail, or for life, or otherwise, with their respective rights, members and appurtenances, and all the estate, right, title, interest, property, profit, benefit and equity of redemption, claim and demand whatsoever, which the said bankrupt at the time of his becoming bankrupt had of in or to all and singular the said messuages, lands, tenements and hereditaments, respectively.” From the death of his father in the year 1767, until his bankruptcy in the year 1789, a period of more than twenty-two years, *Thomas Eustace* the son never entered into the premises at all, and therefore a right of action only remained in him at the time of his bankruptcy. His entry was taken away by the stat. 21 *Jac.* 1. c. 16. which enacts, that no person shall make any entry into any lands, &c. but within twenty years next after his right shall first descend or accrue, and in default thereof, such person shall be utterly excluded and disabled from such entry after to be made. There is a proviso in the statute in favour of infants, but the infant must, within ten years next after his full age, take the benefit of that proviso, and at no time after ten years. *Thomas Eustace* the son was of full age in the year 1772, and did not become a bankrupt until the year 1789, more than ten years after his full age; during which time he neither entered nor sued for the premises, and therefore his entry was taken away at the time of his bankruptcy. Under these circumstances, it is submitted that judgment ought to be arrested; first, because the commissioners have no authority whatever under the statutes of bankrupts, to grant any rights of action, which a bankrupt may have to any lands or tenements at the time of his bankruptcy; secondly, because, supposing they have such authority, this right of action did not pass to the assignees, by the bargain and sale stated upon this record.

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As to the first point, it must be admitted that nothing can pass to the assignees of a bankrupt, but what the statutes of bankrupts give the commissioners authority to grant. From
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first impressions upon this subject, occasioned chiefly by referring to the interest which the assignees of a bankrupt take in his personal estate, the most frequent subject of discussion and therefore the most familiar, one is led to conclude that whatever actions the bankrupt himself might have had, before his bankruptcy, to enforce his right to any real estate, the same shall his assignees have after his bankruptcy. But the interest which the assignees take in the *real* estate of a bankrupt, is not co-extensive with that which they have in his *personal* estate, and it by no means follows, because rights of action which the bankrupt has to recover debts or other personal property, are transferred to the assignees, that therefore his rights of action to recover real property are given to them by the bargain and sale. If it were a principle of law, that immediately on an act of bankruptcy committed, the *real* and personal estate of the bankrupt vested in his assignees by the mere act and operation of law, in the same manner as the real and personal estate vests in the heir and executor, then the inference contended for might be supported, because undoubtedly a right of action will descend to the heir. But the case of assignees of a bankrupt is very different, for their interest in both real and personal estate depends wholly upon positive provisions created by statute. With respect to rights of action to recover his personal property, the commissioners are authorized to assign them by the express provision of the statute of 1 Jac. 1. c. 15. s. 13. and the assignees are enabled thereby to bring such actions in their own names. But there is no such provision in any of the statutes, respecting the bankrupt's rights of action to recover *real* property. An act of bankruptcy does not divest the property out of the bankrupt. It continues in him until the assignment. 1 Atk. 96. *Drury v. Man*, and therefore it is no plea to an action brought by him after his bankruptcy, to say that he became a bankrupt, and a commission issued against him, without stating an assignment by the commissioners, 1 Salk. 108, *Carey v. Crisp*. Consequently no estate vests in the commissioners, but only a power to grant, and their grantees are considered in the light of every other vendee. They take by force of the assignment or bargain and sale, and not otherwise. Therefore if the commissioners grant any copyhold lands of the bankrupt to the assignees, they, like other vendees, must be admitted before they can surrender, 1 Atk. 96. So the assignment
ment

ment of a lease for years by the commissioners, is considered as an assignment by the lessee himself. It being proved then, that the assignees derive their title solely under the bargain and sale or assignment, and that the commissioners have no power or authority to convey any thing but what is given them by the statutes of bankrupts, the next thing to be considered, is the authority which the commissioners derive from those statutes. There are but four, *viz.* 34 and 35 *H. 8. c. 4.* 13 *Eliz. c. 7.* 1 *Jac. 1. c. 15.* and 21 *Jac. 1. c. 19.* which relate to the disposition of the *real* estate of a bankrupt. The 34 and 35 *H. 8.* enacts, that the persons therein named “ shall have
 “ power and authority to take by their wisdoms and discre-
 “ tions, such orders and directions, as well with the bodies of
 “ such offenders aforesaid, as also with their lands, tenements,
 “ fees, annuities, and offices, which they have in fee simple,
 “ fee tail, term of life, term of years, or in right of their wives,
 “ as much as the interest, right and title of the same offender
 “ shall extend to be, and may then be departed with by the
 “ said offender, &c.”

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Now notwithstanding the words *fee tail* are here used, yet an estate tail could not, either by virtue of that statute, or of the 13 *Eliz.* be granted by the commissioners for a longer period than during the life of the bankrupt tenant in tail, because that was as much as the interest, right and title of the bankrupt tenant in tail extended to, and he could lawfully depart with. From hence therefore a strong argument arises. For tenant in tail might at that time, as well as the present, certainly have made an absolute disposition of the lands by recovery or fine; but as he could not depart with them by deed indented and inrolled, for a longer period than during his own life, it was thought necessary to give to the commissioners a power to do so, by the express provisions of the statute of 21 *Jac. 1. c. 19.* It might have been argued before the passing of that statute, with great plausibility and show of reason, that as tenant in tail might by particular modes of conveyance have departed with the estate tail, and have barred as well all remainders and reversions expectant as his own issue, therefore the commissioners were enabled by those other statutes, to grant the same interest in the estates tail of the bankrupt to the assignees by the bargain and sale, as the bankrupt himself might have done by recovery or fine, and that the Court ought to

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to construe those statutes liberally in favour of creditors. But it is fair to presume that this kind of argument did not prevail; for if it had prevailed, it would have been nugatory to provide for this case by a particular act of Parliament. The stat. 13 *Eliz. c. 7.* repeats the provisions of that of *Hen. 8.* and uses the same expression as to what the bankrupt may “*lawfully depart withal,*” and in the 11th section it enacts, that if at any time after the bankruptcy, lands, &c. shall be purchased by, or shall descend, revert, or by any means come to the bankrupt, before his creditors are satisfied, such lands, &c. shall be bargained, sold, &c. in such manner as other the lands, &c. of the bankrupt which he had when he was declared a bankrupt, should or might have been bargained, sold, disposed of, &c.”

Lord *Hardwicke*, *ex parte Proudfoot*, 1 *Atk.* 252. takes a distinction upon this section, between the interest which the assignees take in the real and in the personal estate of a bankrupt. His words are “when assignees are chosen, all the estate and effects of the bankrupt are vested in them, and he is incapable of carrying on any trade, and all his future personal estate is effected by the assignment, and every new acquisition will vest in the assignees; but as to future and *real* estates, there must be a new bargain and sale.” Now suppose *Thomas Eustace* had, after his bankruptcy, brought an action and recovered the estate in question, in that case it is unquestionable that there must have been a new bargain and sale made to the assignees, because they were lands which had come by that means to the bankrupt after his bankruptcy, and are therefore within the express provision of the 11th section of the statute of 13 *Eliz.* His bankruptcy and the bargain and sale by the commissioners, would not have been any plea to such an action brought by him. If this position be well founded, which will scarcely be disputed, it follows, that the right which the bankrupt had to the lands in question did not pass by the bargain and sale; for if he could himself have recovered them in his own name, after his bankruptcy, and the execution of the bargain and sale, and the estate when recovered would have been considered as a new estate, which had come to the bankrupt after his bankruptcy, and of which there must have been new bargain and sale made, it is a necessary consequence that the right of action which he had to recover those lands, at the time of the bankruptcy, did not pass to the assignees by the assignment

ment or bargain and sale. It is not contended, that this right of action which the bankrupt had could not by any means have been applied for the benefit of his creditors; on the contrary, it may be admitted that this right did as much belong to his creditors, as any lands in his possession. But the point is, that this right did not pass by the assignment or bargain and sale. The remaining two statutes, which take notice of the real property of a bankrupt, *viz.* 1 *Jac.* 1. c. 15. and 21 *Jac.* 1. c. 19., merely extend the provisions of the 13 *Eliz.* c. 7. to other persons described to be bankrupts. *

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It appears, then, that there are no words in either of those statutes, which can by any possibility be construed to give to the commissioners a power to grant rights of action to recover real property unless the words “*may lawfully depart withal*,” or the word “*hereditaments*” in the statutes of *Hen.* 8. and *Eliz.* shall be supposed to include such rights. With respect to the words “*may lawfully depart withal*” they seem from the whole context of the statutes taken together, to mean such interests in real estates as the bankrupt himself might have departed with by bargain and sale, and deed indented and inrolled. If he was seised in fee, the whole estate would pass; if in tail, or for life, or in right of his wife, then no greater interest would pass than during his own life. But those words cannot be construed to pass rights of action; for they cannot lawfully be departed with. They cannot be granted, or pass by deed, though for a valuable consideration, and every such conveyance is void; for nothing in action, entry, or re-entry, can be granted over, *Litt. s.* 347. *Co. Litt.* 214 a. 2 *Black. Comm.* 290. The only conveyance by which lands and tenements were granted at the common law, was by feoffment and livery of seisin; but no feoffment and livery could be made unless the feoffor had entered into the lands. *Co. Litt.* 9 a. Rights of action cannot be devised, *Com. Dig. Devise* (M.). They are not forfeitable for treason or felony. There can neither be a tenancy by the curtesy, nor in dower of a right of action. No lease can be made by one who has only a right of action, and therefore in special verdicts it is always found that the lessor entered and was seised, *prout lex postulat*. Nor is this all. By the statute 32 *H.* 8. c. 9. it is made *penal* to “*grant or buy any pretended right or title to any lands and tenements.*” In *Partridge v. Strange*, *Plowd.* 88. *Montague*,
Ch. J.,

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Ch. J., commenting upon this statute says, that “where one man is *in possession* of lands and tenements, and another that is *out of possession* claims them, or sues for them, that is a pretended right or title.” And in *Co. Litt.* 369 *a.* it is said, that “if *A.* be disseised, in this case *A.* hath a good law-ful right; yet if *A.* being out of possession granteth to “or contracteth for the land with another, he hath now “made his good right of entry pretended within the sta-“tute, and both the grantor and grantee within the danger “thereof, *a fortiori* of a right in action.” And in *Plowd.* 88. it is said, that this statute “has not altered the law; for

“the common law before this statute was, that he who was “out of possession might not bargain, grant or let his right or “title; and if he had done it, it should have been void.” Therefore such a right cannot be *lawfully departed with*. Hence it plainly appears, that the bankrupt himself could not have departed with his right of action by bargain and sale by deed indented and inrolled. And as he himself could not, neither can the commissioners grant it under the statutes, which enact, that the bargain and sale made by virtue of them shall only be as effectual as a bargain and sale made by the party himself, by deed indented and inrolled. The eleventh section of 13 *Eliz.* proves that nothing was intended to be granted by that statute, but either lands of which the bankrupt was actually seised at the time of the bargain and sale, or else some beneficial interest therein, of which he was possessed at that time. It is true, that the bankrupt may release his right of action; but that can only be to the abator or disseisor himself; and it enures only as a confirmation of his former estate, and not as a new grant. A release of a right differs from a grant, which conveys an interest. But it by no means follows, that because one may release his right to the tenant, he shall therefore be able to depart with it generally. A bankrupt might unquestionably release a condition, and therefore it might, with the same reason, be contended, that a condition would pass by the bargain and sale of the commissioners, under the general words, “*may lawfully depart with*.” But it is manifest that conditions were not grantable until the statute of 21 *Jac.* 1. *c.* 19. *s.* 13. enabled the commissioners to grant them. And the reason why they did not pass by the bargain and sale, under the general words “*may lawfully depart with*”, was, because it is a principle of the common law that

that conditions, though they may be released, are not grantable over. *Litt. Sect.* 347. So the bankrupt might, without doubt, have released a *power*, or *equity of redemption*, and therefore it might be urged that an equity of redemption was included under the general words "*may lawfully depart with.*" But it is certain that an equity of redemption did not pass prior to the statute 21 *Jac.* 1. *c.* 19. So a bankrupt lessee might have released a covenant; as if the lessor had covenanted with him for the renewal of the lease; yet it has been holden, that such a covenant could not be granted by the commissioners, *Drake v. Mayor of Exeter*, cited 2 *Vern.* 97. *Vandenanker v. Desbrough.* [459] So a bankrupt who is seised of lands as a trustee, may depart with the lands for the purposes of the trust; but as he cannot lawfully depart with them for any other purpose, the commissioners cannot grant them to the assignees, and therefore he may sue in his own name for anything in respect to such lands, notwithstanding his bankruptcy and the assignment by the commissioners, 1 *Term Rep. B. R.* 619. The case of *Higden v. Williamson*, 3 *P. Wms.* 131. is distinguishable from the present. That arose on a contingent interest in money, a possibility of having a share of a sum of money upon a contingency. Sir *Joseph Jekyll* indeed grounded his opinion upon the direction of the statute of 13 *Eliz.* that the commissioners shall assign over all that the bankrupt might depart withal; and that as the bankrupt might have released this contingent interest, so the commissioners were enabled to assign it. But it is obvious that this opinion is not well founded. For the words "*may lawfully depart withal*", in the statutes of *Hen.* 8. and *Eliz.* do not relate to the assignment of the personal estate of the bankrupt, but only to the bargain and sale of his real estate. And Lord *King's* chief reason for affirming the decree was, that the statutes for discharging bankrupts on certificates, never intended to intitle them to *any estate* by virtue of any claim anterior to the bankruptcy; and besides that the word "*possibility*" was in all the later statutes touching bankrupts. The statute he particularly alluded to was 5 *Geo.* 2. *c.* 20. the words of which are "*all such effects* of which the party was possessed or interested in, or whereby he hath or may expect any profit, benefit or advantage whatsoever." But in the present case there is neither a contingent interest, nor a possibility either in money or land; but simply a *right of action* to recover lands in the

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the possession of another. The assignees might have recovered these lands in the name of the bankrupt, and the commissioners would then have been enabled to grant them by a new bargain and sale. Or if the bankrupt himself had voluntarily brought an action and recovered them, the commissioners would still have had it in their power to grant them by a new bargain and sale. For these reasons it is submitted to the Court, that rights of action are not included in the words “may lawfully depart withal.” Nor are they comprehended under the word “*hereditaments*.” A right of action indeed is so far an hereditament, that it will descend to the heir. 3 Co. 2 b. *Marquis of Winchester’s case*. But a thing may descend to the heir, which can neither be released nor discharged, as a possibility of a use, *Wood’s case*, cited in *Shelly’s case*, 1 Co. 99 a. So a condition is an hereditament, 3 Co. 2 b. Yet conditions to which the bankrupt was entitled, were not included in the general word “*hereditaments*”, and therefore did not pass by the bargain and sale of the commissioners, until they were expressly authorized to grant them by name, by the statute 21 Jac. 1. c. 19. No instance can be adduced where a right of action has been held to be comprehended under the word “*hereditaments*.” But there are instances to the contrary. All the lands, tenements and hereditaments of a man attainted of treason, were by the common law forfeited to the king. But it has been holden, that if a man committing treason has, at the time of committing it, only a right of action to recover lands, this right neither at common law, nor by the statute 33 H. 8. c. 20. is given to the King. 1 Hale, P. C. 242. s. 3. So the Statutes of Monasteries. 27 H. 8. c. 28. and 31 H. 8. c. 13. gave to the King all lands, tenements, *hereditaments*, rights, entries, conditions, &c. But it was holden, that rights of action were not given to the king by the general word *hereditaments*, 3 Co. 2 b. So a writ of error is a right of action, and also an hereditament, but assignees of a bankrupt cannot bring a writ of error in their own name. It is presumed therefore, for these reasons, that the Court will be of opinion that *rights of action* are not included under the word *hereditaments*. But secondly, supposing the commissioners to have had a power to grant the right of the present action, yet it did not pass to the demandants by the bargain and sale stated upon this record. The words of the bargain and sale are “all and singular the messuages, lands, tenements
“ and

“ and hereditaments, whatsoever and wheresoever, of or be-
 “ longing to the said *Thomas Eustace* the bankrupt, in fee sim-
 “ ple, fee tail, or for life, or otherwise, with their respective
 “ rights, members and appurtenances, and all the estate, right,
 “ title, interest, property, profit, benefit, and equity of redemp-
 “ tion, claim and demand, whatsoever, which he the said *Thomas*
 “ *Eustace* the bankrupt, at the time of his becoming bankrupt
 “ as aforesaid, had of, in or to all and singular the *said* mes-
 “ suages, lands, tenements and hereditaments, &c.” Now the
 Court must construe this deed in the same manner as they con-
 strue all other deeds. The ground of the objection is, that there
 are no special words used in the bargain and sale which are
 necessary to be used in order to pass such rights. The general
 words in the deed are not sufficient for that purpose. For a
 right of action is neither a messuage, nor land, nor a tenement,
 nor a hereditament, and the general words “*and all the estate,*
right, title, &c.” are confined to the *said* messuages, &c. Rights
 of actions, if grantable at all, can only be granted with a spe-
 cial recital of the nature of the right. Suppose the bankrupt
 had been seised of copyhold estates, will it be contended that
 they passed to the assignees by this bargain and sale? And yet
 the words “lands, tenements and hereditaments” comprehend
 all kinds of land. Therefore as there is no mention made of
 the nature of the right which the bankrupt had to the lands in
 question, and as it is not expressly granted, it did not pass by
 the deed stated on this record.

Le Blanc, who was going to reply, was stopped by the Court.

Lord Ch. J. EYRE. This case has been very elaborately and
 ably argued by my Brother *Williams*; but his argument goes
 against the most express and plain spirit of the bankrupt laws,
 which is, that every beneficial interest which the bankrupt has
 shall be disposed of for the benefit of his creditors. Though
 this is the spirit of those laws, yet advantage may be taken of
 particular expressions to raise difficulties, and arguments may
 be drawn from the strict rules of law as applied to the letter
 of the statutes. It has been argued, that though the intent of
 the legislature was, that all the bankrupt's property should
 pass, yet that the Court is tied up by the expression “*may*
lawfully depart withal.” But it may as well be argued, that
 because in the statute of *Hen. 8.* the words *bargain and sale*
 are used, therefore nothing would pass but what the bankrupt
 might

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might convey by a bargain and sale. But those words are omitted in the 13 *Eliz.* and all the bankrupt acts being *in pari materiâ* are to be construed together. It is true that on general principles rights of action are not forfeitable, nor assignable, except in a particular mode; but that rule is founded on the policy of the common law, which is averse to encourage litigation; but in this case the policy of the bankrupt laws requires that the right of action should be assignable and transferred to the assignees as much as any other species of property. It is an hereditament, and the words of the several statutes are large enough to comprehend it, and no case has been shewn to prove that it ought not to pass. What then does the whole argument amount to but this, that in many cases, from the policy of the law, a right of action does not pass? But here the policy is, that every right belonging in any shape to the bankrupt, should pass to his assignees. And this being the clear intent of the law, a particular recital of this species of right could not be necessary. I therefore think it a clear case, both on the words of the acts of parliament and on the subject-matter.

BULLER, J. I entirely concur in opinion with my Lord Chief Justice on both points. All the statutes of bankrupts are *in pari materiâ*, and are to be taken together, and the object of them was, that every thing belonging to the bankrupt that can be turned to profit, shall pass by the assignment for the benefit of the creditors. My Brother *Williams* admits that this right may be used for their benefit, but he says that the action ought to be brought in the name of the bankrupt himself. But was it the intention of the Legislature that the bankrupt should bring actions? On the contrary, every thing is given to the creditors, and the assignees are to bring actions. With respect to the argument from the cases of trusts and a writ of error, neither of them are applicable, for no profit can be made of a trust or writ of error.

As to the case cited from 2 *Vern.*, I very much doubt the authority of that case: as at present advised, I do not see why a covenant for the renewal of a lease, of which a profit may be made, may not be assigned: and that case is very much shaken by *Higden v. Williamson* which goes a great way to decide the present. There no distinction was thought of between real and personal property, but Sir *Joseph Jekyll* decided on the ground of

of the stat. 13 *Eliz.* having transferred every thing belonging to the bankrupt to the assignees. On the words indeed of that statute, there can be no doubt, as it directs that the conveyance by the assignees shall be good and effectual in law, to *all intents, constructions, and purposes*, against the offender, and all persons claiming under him. If this be true, I think there can be no doubt on the words of the deed of assignment, which is not a particular conveyance of particular lands, but a general conveyance of all the real and personal property of the bankrupt. And the court is bound to construe the bankrupt laws in the most liberal and beneficial manner for the creditors. I therefore hold that every species of right, of which by any possibility profit can be made, passes to the assignees.

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HEATH, J. I am of the same opinion. My Brother *Williams's* argument goes to prove, that even a right of entry on a vacant possession would not pass by the assignment. But he says the assignees are not without remedy, for the action may be brought in the name of the bankrupt; but suppose the bankrupt were to release his right of action, or make a fraudulent conveyance, if he were to bring the action, such release or conveyance might be set up to defeat it. As to the case cited from *Vernon*, I think it a very strange one, for a covenant to renew a lease runs with the land. With respect to the second point, I am also of opinion that the words used in the assignment were sufficient. The commissioners are strangers to the bankrupt, and cannot describe every particular species of his property. We should therefore do infinite mischief, if we were to hold, that every thing belonging to him did not pass under the general words that are used.

ROOKE, J., of the same opinion.

Rule for arresting the judgment discharged.

BOULTON and WATT *against* BULL.Saturday,
May 16th.

THIS was an action on the case for infringing a patent. The first count of the declaration stated, that the king by letters patent

A patent
was granted
to *A. B.* for
a new in-
vented me-

thod of using an old engine in a more beneficial manner than was before known. The specification stated, that the *method* consisted of certain *principles*, and described the mode of applying those principles to the purposes of the invention, and an act of parliament, reciting the patent to have been for the making and vending *certain engines* by him invented, extended to *A. B.* for a longer term than 14 years, the privilege of *making, constructing* and selling the *said engines*.

Q. Whether, under these circumstances, the patent right was valid (a)?

(a) [This question came afterwards before the Court of King's Bench, in the

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patent under the great seal, bearing date on the 5th of *January*, 1769, granted to the Plaintiff *James Watt* the sole benefit and advantage of making, exercising and vending a certain *invention* of him the said *James*, being a *method* by him *invented* of lessening the consumption of steam and fuel in fire engines, for the term of 14 years, with a proviso for a specification, &c. in the usual manner. It then stated, that by a private act of parliament passed in the 15th year of the king, the benefit of the patent (a) was extended to 25 years, to *Watt* and his assigns: that on the 5th of *September*, 1777, he assigned two thirds of the patent right to *Boulton* the other Plaintiff, for the remainder of the term of 25 years, and that the Defendant, against the consent of the Plaintiffs, *made, constructed and sold* divers engines, *in imitation* of the said engine so invented and found out by *Watt*, and of the like nature and kind, in breach of the said act of parliament, and against the privilege granted to *Watt* as aforesaid, whereby, &c. The second count was for *making and constructing* (not mentioning *selling*) engines, &c. like the first count. The third was for making, constructing and selling engines, &c. *partly* in imitation as aforesaid. The fourth, for making and constructing (omitting *selling*) engines *partly* in imitation &c. The fifth, for *using and putting in practice* the *invention* of the Plaintiff *Watt*. The sixth, for using and putting in practice *part* of the said invention. The seventh for *counterfeiting* the said invention, and using and putting in practice certain engines, counterfeiting the said engine mentioned in the said act of parliament. The eighth, for *imitating* the said invention. The ninth, for *resembling* the said invention. The tenth, for counterfeiting *in part* the said

the case of *Hornblower v. Boulton*, 8 T. R. 95, on error from the Common Pleas, when it was unanimously resolved that the invention was the subject of a patent, and the patentee's right was valid. It seemed admitted there that under the statute 21 Jac. 1. c. 3. s. 6. there cannot be a patent for a philosophical principle only, which has been since held in the case of *Rex v. Wheeler*, 2 B. & A. 345. Upon the construction of the word *manufactures* in the statute of *James I.*, the Court in the last cited case observed, "It may perhaps extend also to a new process to be carried on by known implements or ele-

ments acting upon known substances, and ultimately producing some other known substance, but producing it in a cheaper or more expeditious manner, or of a better and more useful kind." As to patents for *improvements*, see *Harmar v. Playne*, 11 East, 110. *Macfarlane v. Price*, 1 Stark. N. P. C. 199. *Lord Cochrane v. Smet-hurst*, *ibid.* 205. *Campion v. Benyon*, 3 Brod. & Bing. 5. See also *Hill v. Thompson*, 8 Taunt. 375. 3 Merivale, 629. 2 B. Moore, 424. S. C. *Savory v. Price*, 1 R. & M. N. P. C. 1.]

(a) This act is stated at large, in the arguments on the part of the Defendant.

invention,

invention, and using and putting in practice engines counterfeiting in part the said engine &c. The eleventh, for *imitating in part* the said invention. The last, for resembling *in part* the said invention.

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The general issue being pleaded, the cause came on to be tried before the Chief Justice at the sittings after *Trinity* term 1793, when a case was reserved for the opinion of the court, which stated, that his present majesty by letters patent dated the 5th day of *January* in the ninth year of his reign, granted to the Plaintiff *James Watt*, his special licence, full power &c. that he the said *James Watt*, his executors, administrators and assigns should and lawfully might, during the term of fourteen years therein mentioned, use, exercise and vend, throughout that part of *Great Britain* called *England*, the Dominion of *Wales*, and Town of *Berwick* upon *Tweed*, and also in his majesty's colonies and plantations abroad, his the said *James Watt's* new invented method of lessening the consumption of steam and fuel in fire engines, with the usual proviso for the inrolling of the specification. That *Watt* did in pursuance of the proviso, cause a specification or description of the nature of the said invention, to be inrolled in the Court of Chancery, which description was particularly set forth in the said act of parliament, and was as follows, “ my *method* of lessening the [465]

“ consumption of steam, and consequently fuel in fire engines,
 “ consists of the following *principles*. First, that vessel in
 “ which the powers of steam are to be employed to work the
 “ engine, which is called the *cylinder* in common fire engines,
 “ and which I call the *steam vessel*, must during the whole time
 “ the engine is at work, be kept as hot as the steam that enters
 “ it; first, by inclosing it in a case of wood, or any other
 “ materials that transmit heat slowly; secondly, by surrounding
 “ it with steam or other heated bodies; and thirdly, by suffer-
 “ ing neither water nor any other substance colder than the
 “ steam, to enter or touch it during that time. Secondly, in
 “ engines that are to be worked wholly or partially by conden-
 “ sation of steam, the steam is to be condensed in vessels dis-
 “ tinct from the steam vessels, or cylinders, although occasion-
 “ ally communicating with them. These vessels I call con-
 “ densers, and whilst the engines are working, these cylinders
 “ ought at least to be kept as cool as the air in the neighbour-
 “ hood of the engines, by application of water or other cold
 “ bodies.

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“ bodies. Thirdly, whatever air or other elastic vapour is not
 “ condensed by the cold of the condenser, and may impede the
 “ working of the engine, is to be drawn out of the steam vessels
 “ or condensers by means of pumps wrought by the engines
 “ themselves, or otherwise. Fourthly, I intend in many cases
 “ to employ the expansive force of steam to press on the pis-
 “ tons, or whatever may be used instead of them, in the same
 “ manner as the pressure of the atmosphere is now employed
 “ in common fire engines. In cases where cold water cannot
 “ be had in plenty, the engines may be wrought by this force
 “ of steam only, by discharging the steam into the open air
 “ after it has done its office. Fifthly, where motions round an
 “ axis are required, I make the steam vessels in form of hollow
 “ rings or circular channels, with proper inlets and outlets for
 “ the steam, mounted on horizontal axles, like the wheels of a
 “ water mill; within them are placed a number of valves, that
 “ suffer any body to go round the channel in one direction
 “ only. In these steam vessels are placed weights, so fitted to
 “ them as entirely to fill up a part or portion of their channels,
 “ yet rendered capable of moving freely in them, by the means
 “ hereinafter mentioned or specified. When the steam is ad-
 “ mitted in these engines between these weights and the valves,
 “ it acts equally on both, so as to raise the weight to one side
 “ of the wheel, and by the re-action on the valves successively,
 [466] “ to give a circular motion to the wheel, the valves opening in
 “ the direction in which the weights are pressed, but not on
 “ the contrary: as the steam vessel moves round, it is supplied
 “ with steam from the boiler, and that which has performed its
 “ office may either be discharged by means of condensers, or
 “ into the open air. Sixthly, I intend in some cases to apply
 “ a degree of cold not capable of reducing the steam to water,
 “ but of contracting it considerably, so that the engines shall
 “ be worked by the alternate expansion and contraction of the
 “ steam. Lastly, instead of using water to render the piston
 “ or other parts of the engines air and steam tight, I employ
 “ oils, wax, resinous bodies, fat of animals, quicksilver, and
 “ other metals in their fluid state.”

And the said *James Watt*, by a memorandum added to the
 said specification, declared, that he did not intend that any
 thing in the fourth article should be understood to extend to
 any engine where the water to be raised enters the steam vessel
 itself,

itself, or any other vessel having an open communication with it. In the fire engines referred to in the said specification, and which were in use prior to the patent in question, motion was given to the piston by the pressure of the atmosphere acting upon one side of it, while a vacuum or certain degree of exhaustion was produced on the other side within the steam vessel denominated the cylinder, by means of the injection of cold water, whereby the steam was condensed; which operation, prior to the invention of the said *James Watt*, was always performed in the steam vessel or cylinder itself; when the steam had been condensed, and the piston had descended, such portions of air and water as remained under it within the steam vessel or cylinder, were expelled through valves by the next succeeding steam from the boiler, and that steam counterbalancing the pressure of the atmosphere at the open end of the cylinder, allowed the piston to rise up with that end of the lever to which it was attached, while the other end of the lever and the matters attached thereto descended by reason of their greater comparative weight, and thus the engine was restored to that state in which it was previous to the first condensation. The steam was, for this purpose, as occasion required, admitted through a pipe from a distinct vessel called the boiler, where it was generated, which occasionally communicated with the cylinder by means of a valve, which was opened and shut by the action of the engine. The injection of cold water was in like manner admitted, as occasion required, into the cylinder through a pipe from another distinct vessel containing cold water, called the injection cistern, by means of a cock or valve which was also opened and shut by the action of the engine, and such pumps as were used in these engines were also wrought by the engines themselves. The construction and use of pumps for drawing out air, elastic vapour, or water from places or vessels where a vacuum or exhaustion was required, were known and practised before the obtaining the letters patent above mentioned, but had not been applied to the cylinders or condensers of steam engines. The said invention of the said *James Watt* was at the time of making the said letters patent, *a new and a useful invention*, and the said privilege vested by the said act of parliament in the said *James Watt* and his assigns, was infringed by the Defendant in the manner charged upon him by the declaration. The said *specification* made by the said *James Watt*,

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Watt, is of itself sufficient to enable a mechanic acquainted with the fire engines previously in use, to construct fire engines producing the effect of lessening the consumption of fire and steam in fire engines, upon the principle invented by the said James Watt.

And the questions for the opinion of the Court were,

1st. Whether the said patent was good in law, and continued by the act of parliament above mentioned?

2d. Whether the above specification of the Plaintiff *James Watt* was in point of law sufficient to support the above patent?

This case was twice argued, the first time by *Watson*, Serjt., for the Plaintiffs, and *Le Blanc*, Serjt., for the Defendant; and the second, by *Adair*, Serjt., for the Plaintiffs, and *Williams*, Serjt., for the Defendant.

[468] On the part of the Plaintiffs, the substance of the arguments was the following. The Plaintiffs have a right to recover damages for the infringement of their patent, which is: 1st, both good in law, and continued by the act 15 *Geo. 3. c. 61.*; and 2dly, duly supported by the specification. It is good in law, as being for a newly discovered method of producing an important effect in the use of the old steam engine, and comes within the provision of the stat. 21 *Jac. 1. c. 3. s. 6.* which protects inventions of this kind from the declaration mentioned in the former part of the statute. By every fair rule of construction, the words “working or making any manner of new *manufactures*,” must include the invention of the Plaintiffs. The term *manufacture* means “any thing made or produced by art,” and the method or invention for which the patent is granted, is to produce an effect by artificial means, by which the consumption of fuel shall be lessened in steam-engines. Whether the word *method* be used as in the patent, or *engine* as in the act for continuing it, the meaning is obviously the same, and the Court will not deprive the Plaintiffs, the merit and utility of whose invention is on all sides admitted, of the benefit of that invention by mere verbal criticisms.

[HEATH, J. When a mode of doing a thing is referred to something permanent, it is properly termed an engine; when to something fugitive, a method.] This patent is not expressed in terms new or unusual; almost all the patents upon record that have been granted to those who have made discoveries or improvements in the mechanic arts, being for the method of doing the thing, and not for the thing done. [HEATH, J. Is there

there any instance of a patent for a mere method?] The patent granted to *Dollond* for his improvement in making the object-glasses of telescopes was, for “an invention of *a new method* “of making the object-glasses of refracting telescopes.” So also, *David Hartley’s* patent was for his *method* of securing buildings from fire. So likewise are the numerous patents that have been granted for the different improvements which have been made of late years, in chemistry and medicine (a). The patent, therefore, of the Plaintiffs is good in law: and it is also continued by the act 15 *Geo. 3.* That act expressly recites the patent, and extends the benefit of it for 25 years to *Watt* and his assigns. It was therefore clearly the intention of the legislature that the patent already granted should be continued, and the Court will construe the act in such a manner as to effectuate that intention.

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With regard to the specification, that is sufficiently explicit to support the validity of the patent. The improvement made by *Watt* consists in a discovery, that by letting out the steam from the cylinder into another vessel in order to condense it, instead of admitting cold water into the cylinder for that purpose, as was done in *Newcomen’s* engine, and by keeping the cylinder hot, the consumption of steam and consequently of fuel would be diminished. The communication between the cylinder and the other vessel is formed by means of valves, which were before in use in *Newcomen’s* engine, and therefore not necessary to be more accurately described, and the mode of keeping the cylinder hot is explicitly stated in the specification. There is no new mechanical construction invented by *Watt*, capable of being the subject of a distinct specification, but his discovery was of a principle, the method of applying which is clearly set forth, and therefore a drawing or model would have been unnecessary. So in *Dollond’s* patent, (to take one of many instances) the specification describes the principle, but not the mechanical construction by which it is carried into effect. It recites, that a patent had been granted to him for the “invention of a new method of making the object glasses ‘of refracting telescopes, by compounding mediums of different “refractive qualities, whereby the errors arising from the dif-

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(a) A great variety of patents of this kind were cited which it is not necessary to repeat, as they all went to the same point.

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“ferent refrangibility of light, as well as those which are produced by the spherical surfaces of the glasses, were perfectly corrected.” It then goes on to state, after mentioning the defects of the telescopes then in use, that in the new telescopes the images of objects were formed by the difference between two contrary refractions, the object-glass being a compound of two or more glasses put close together, whereof one was concave and the other convex : that the excess of refraction by which the image was formed was in the convex glass, which was made of a medium or substance in which the difference of refrangibility was not so great as in the substance of which the concave glass was formed ; therefore, their refractions being proportioned to their difference of refrangibility, there remained a difference of refraction by which the image was formed, without any difference of refrangibility to disturb the vision : and that the radii of the surfaces of each of those glasses were likewise so proportioned, as to make the aberrations which proceeded from their spherical surfaces respectively equal, which being also contrary, destroyed each other. But there is no mention of any mechanism, nor does the specification state the degrees of sphericity or curvature of the concave or convex glasses, because it is well known that the curvature of one must be proportioned to that of the other, in order to correct the refrangibility of the rays of light. It is also to be observed, that the jury have found that the specification is sufficient to enable a mechanic acquainted with the fire engines previously in use, to construct fire engines producing the effect of lessening the consumption of fire and steam upon the principle invented by the Plaintiff *Watt*. It is upon the whole, therefore, submitted to the court, that both the questions stated in the case must be answered in the affirmative.

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[BULLER, J. The objection to *Dollond's* patent was, that he was not the inventor of the new method of making object-glasses, but that Dr. *Hall* had made the same discovery before him. But it was holden, that as Dr. *Hall* had confined it to his closet, and the public were not acquainted with it, *Dollond* was to be considered as the inventor.]

On the part of the Defendant the arguments were the following.

This question may be argued on three grounds. 1. On the patent

patent itself. 2. Upon the act 15 Geo. 3. c. 61. 3. Upon the act and patent taken together. 1795.

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In considering the case upon the patent itself, the patent appears to be void, because it differs from the specification, the patent being for a formed instrument or machine, but the specification for principles unorganized. It is for a new *invented* method. Now the word *invention*, when applied to mechanical subjects, properly signifies something which has been already formed, some manufacture or machine, and is not applicable to mere unorganized principles. The Plaintiff *Watt* cannot be said to have invented the principles, for those principles were in use in the old or *Newcomen's* steam-engine. It is true, that the application of those principles in the manner described in the specification is new, but it was well known long before that steam had an expansive power, and was condensed by cold. It is in this sense that the word *invention* is used in the patent. It recites "that *Watt* had represented to the king, that he had *after much labour and expense invented* a method of lessening the consumption of steam and fuel in fire-engines." From these words it seems clear that he meant it to be understood by the crown, that the *invention* which he represented himself as having made, was completely formed, and not that he had merely conceived in his mind the application of certain known principles by which the consumption of steam and fuel would be lessened in fire-engines: for the ideas of the principles before they were organized could not have been attended with great *labour*, and much less with great *expense*. That the representation was understood in this sense by the crown, will appear from considering other parts of the patent itself. The king grants to *Watt* that he shall "*make, use, exercise and vend* his said *invention*." In another part of the patent all persons are forbidden to *counterfeit, imitate or resemble* the same *invention*, and to *make* or cause to be *made* any *addition* thereto, or *subtraction* therefrom. In another part it is provided, that the patent shall not extend to give privilege to *Watt* to use or exercise any *invention or work* whatsoever which had theretofore been *found out or invented* by any other, and publicly *used or exercised*, but that every other person should *use and practise* their several *inventions*. Now it is impossible that any of the expressions thus cited from the patent can be applied to the invention of mere unorganized principles of science. If then

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then the patent be, which it clearly is, for a formed instrument or machine, it is void, because it is admitted that there is no *specification* descriptive of any formed instrument whatever, nor is there any drawing or model.

But supposing it to be a patent for mere principles, (for the specification states that the *invention* consists of *principles*,) it is neither originally good in law, nor is it continued by 15 Geo. 3. c. 61. It is not good in law because it does not fall within the construction of the statute 21 Jac. 1. c. 3. upon which alone it must, if at all, be supported. The sixth section of that statute provides, that nothing therein contained shall extend to any letters patent, or grants of privilege for 14 years or under, thereafter to be made, of the *sole working or making* of any manner of *new manufactures*, within this realm, to the true and first *inventors* of such *manufactures*, which others at the time shall not use. The word *manufacture* is descriptive either of the practice of making a thing by art, or of the thing when made. The invention therefore of any instrument used in the process of making a thing by art, is a *manufacture*, and the subject of a patent within the statute, because such an instrument is itself a thing made by art. So also *medicines* may be said to be a species of manufacture, and within the provision of the statute, because they consist in the practice of mixing together and making up by art, the different ingredients of which they are composed, and are the result of principles organized, as far as the nature of the thing will admit. The same observation may be made with respect to *Dollond's* telescopes, which are certainly a manufacture, and within the statute Jac. 1., but they consist of principles reduced into form and practice as much as the subject will admit, and the patent is for glasses completely formed, not for mere principles, and the specification describes the manner in which the invention is to be carried into execution with all the perspicuity of which the thing is capable. That this is the true meaning of the term *manufacture* as it is used by the legislature, likewise appears from the words *making* or *working* being applied to it, and “which others at the time shall not *use*,” and also from the provision that the patentee shall ascertain the nature of his invention, and in what manner the same *is to be performed*. The specification is the price which the patentee is to pay for the monopoly. In the construction of specifications it is a rule that the

patentee

patentee must describe his invention in such a manner that other artists in the same trade or business may be taught to do the same thing for which the patent is granted, by following the directions of the specification alone, without any new invention or addition of their own, and without the expence of trying experiments. 1 *Term Rep. B. R.* 606. *Turner v. Winter*. This necessarily excludes any supposition that mere principles can be the subject of a patent. That this is the true construction of the word *manufactures* in the statute, appears also from Lord Coke's commentary on it, 3 *Inst.* 184, who, as appears from the journals of the House of Commons, was chairman of the committee to whom the bill was referred, and who therefore probably either drew or perused it. This construction of the word *manufactures*, in the statute, is also fortified by the opinion of Mr. J. Yates in the controversy respecting literary property, 4 *Burr.* 2361. *Miller v. Taylor*, who there held in illustration of the subject before him, that mere principles, not embodied and reduced into practice, were not the subject of a patent. Until they are so embodied, (to use the simile of that great judge,) they are like the sentiments of an author, while in his own mind. In that state they are alike the property of him or of another. But when once they are published, then, and not before, his exclusive property in them or in the organization of them commences. In Sir *Richard Arkwright's* case too (a) the learned judge before whom it was tried, stated in his summing up, that for a principle alone a patent could not be obtained, for which he gave very convincing reasons. And independent of authorities, the reason of the thing shews that such a patent could not be obtained within the meaning of the statute. By obtaining a patent for principles only, instead of one for the result of the application of them, the public is prevented, during the term from improving on those principles, and at the end of the term is left in a state of ignorance as to the best, cheapest and most beneficial manner of applying them to the end proposed.

It is true indeed that the jury have found, "that the specification made by *Watt*, is of itself sufficient to enable a mechanic acquainted with fire-engines previously in use, to construct fire-engines, producing the effect of lessening the con-

(a) See the printed account of that trial, at the Sitings at *Westminster* after *Trinity Term* 25 *Geo. 3.* before Mr. J. Buller.

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“sumption of fuel and steam in fire-engines, upon the principle invented by Watt.” But it is not found that the specification would enable a mechanic to *construct Watt’s fire-engines*; nor is it found to *what extent* the consumption of steam and fuel would be lessened in fire-engines constructed upon the principles stated in the specification; nor whether those engines would have the effect of lessening the consumption of steam to the same degree with *Watt’s* engines. All this is left uncertain. The merit of the invention must be measured by the *quantity* of fuel which may be saved by it. Now it is possible, that agreeable to this finding, a fire-engine might be made, which indeed would produce the effect of lessening the consumption of fuel and steam, upon the principles mentioned in the specification, but yet such engine might save only one bushel of coals or other fuel, where *Watt’s* engine would save a hundred. The finding of the jury therefore does not mend the case. The specification ought to have described the method by which the machine might be made to save the greatest quantity of fuel which it was known to be capable of saving, and which it in fact does save when used by the inventor. It is a settled rule of law that if a patentee makes the thing for which the patent is granted with cheaper materials, or if he applies and uses it in a more advantageous and useful manner than is described in the specification, the patent is void, because he does not put the public in possession of his invention, or enable them to derive the same benefit that he himself derives from it. 1 *Term Rep. B. R.* 602. *Turner v. Winter.*

[474] It is to be shewn in the next place, that the patent is not continued by the act 15 *Geo. 3. c. 61.* The title of it is, an act for vesting in *James Watt*, “the sole property of certain steam-engines, called fire-engines, of his invention.” It recites, “that the king by his letters patent had given and granted to *Watt* the sole benefit and advantage of *making and vending* certain *engines* by him invented for lessening the consumption of steam and fuel in fire-engines, with a proviso, that *Watt* should cause a particular description of the nature of the said *invention* to be inrolled, and that he accordingly had caused a particular description of the nature of the said *engine* to be inrolled. It farther recites, that the said *James Watt* had employed many years, and a considerable part of his fortune, in making experiments upon steam-engines, commonly called fire-engines, but
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on account of the many difficulties which always arise in the execution of such large and complex machines, he could not complete his intention before the end of the year 1794, when he *finished some large engines* as specimens of his construction, and that his *engines* might be of great utility, and then enacts, that the sole privilege of *making, constructing* and selling the *engines* therein before particularly described shall be vested in *Watt* for 25 years, and that he during the said term shall *make, exercise and vend* the said *engines*." Now is it possible to say, that this act continues a patent for mere *principles*? Certainly not. If therefore the patent be really for principles, it is not continued by the act. But supposing that though the act does not describe the patent according to the terms of it, yet it does describe it according to its import, namely, as a patent for principles; in that case it would not be within the protection of the statute of *Jac. 1.* for the reasons already offered.

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There is a proviso in the act 15 *Geo. 3.*, that every objection in law competent against the said patent, shall be competent against the act to all intents and purposes, except so far as relates to the term thereby granted. Though this therefore is a grant of a monopoly by the Legislature, yet it is to receive precisely the same construction, as if it had been a grant by letters patent. Now the grant itself is void, being founded on a false suggestion of the party to whom it is made, for it is a rule of law, that if the king's grant be founded on a false suggestion of the party to whom it is made, it is void; as if any thing mentioned in the consideration of the grant be false. 5 *Co. 94 a. Barwick's case.* The consideration, which is the foundation of this grant in the act, is the recital "that the king had in *January* 1765, by his letters patent, granted to *Watt* for the term of 14 years, the sole benefit and advantage of *making and vending certain engines*, by him invented, 'for lessening the consumption of steam and fuel, and that owing to the reasons which are mentioned in the recital, it was probable, that the whole term granted by the patent would elapse before he could receive any compensation adequate to his labour; for which reasons the term granted by the patent is prolonged, and the act vests in him the sole privileges of making, constructing, and selling the said engines for 25 years; that is, the engines, the sole making and vending of which the king had granted by his said letters patent. But it is admitted, that the king did not

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not grant by the patent a monopoly for *making* and *vending* any *engines* whatever. The recital therefore, which is the very foundation of the grant, is untrue. It has been also adjudged, that if a private act of Parliament like the present, be founded upon a false recital, the act is void: as where an act, reciting that *A.* had been attainted of treason, confirms the attainder, and farther enacts that he shall be attainted, and forfeit his lands; the king afterwards grants the lands of *A.* to another; if in fact *A.* never was attainted, or if his attainder appear on the face of it, to have been *coram non judice*, the act is void, and it shall not be made use of as an attainder *de novo*, notwithstanding it confirmed the attainder, and expressly enacted that he should be attainted, but *A.* shall take advantage of it by mere pleading without a writ of error, and shall oust the grantee of the king. *Plowd.* 390. *Earl of Leicester v. Heydon*, where it is laid down, that statutes which mis-recite things to which they refer, are void, and that in the principal case, the statute which recited that *A.* was attainted, when in fact he was not attainted, was void, *ibid.* 400, &c. Another objection to this act 15 *Geo.* 3. is that it professes to vest in *Watt* the exclusive property in an *entire* machine, notwithstanding the invention which he claims to be his, is admitted to be of an *improvement only* of a known machine. And upon this point, it is to be observed, that Lord *Coke* says, “such a privilege as is
 “consonant to law, must be substantially and essentially newly
 “invented; but if the substance was in esse before and a *new*
 “addition thereunto, though *that addition make the former more*
 “profitable, yet it is not a new manufacture in law.” 3 *Inst.* 184. The act is also defective in not setting forth any specification of a formed instrument or machine; it is indeed admitted that no such specification is to be found.

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If the subject be viewed as arising from the patent and act taken together, the arguments which have been already used respecting those instruments separately, apply themselves more strongly, inasmuch as if the act be considered as explanatory of the patent, or as a part of it, there cannot be a doubt but that it means to grant a monopoly for a formed engine or machine. Upon the whole therefore of the case, it appears either that the patent is for an *entire* formed machine, when it ought to have been for an improvement only, and in which case the specification does not correspond with it, or it is for mere principles,

ciples, which, according to the stat. 21 *Jac.* 1. c. 3, cannot be the subject of a patent.

The sum of the reply was as follows. The patent is neither for a formed instrument, nor is the specification for a principle unorganized. The former is for “a new invented *method* of lessening the consumption of steam and fuel in fire engines,” by whatever mode that effect may be produced: the latter states both the principle of the invention, and also the mode in which it is to operate, namely, the preserving the cylinder hot by the means described, and the condensing the steam in separate vessels communicating with the cylinder. The difference in the terms used in the patent and the specification, arises from the nature of the subject, but the real meaning of them is the same. Where an improvement is made upon a machine already known, the patent ought not to be for the machine itself, but for the method of improving it. Thus a patent was granted in 1759, to one *Wood* “for a *scheme* to work a fire engine, at half the expense of coals,” an effect which must have been caused by an alteration of the engine, yet the patent was for the *scheme*, or method, and not for the engine itself. And in the case of an improvement in making watches, *Jessop’s* patent was avoided, because it was for the whole watch, when the invention consisted of only one movement. But notwithstanding this rule, if from the nature of the thing a patent for the new method or improvement only should have the effect of giving a right to the whole machine, that is not of itself a ground on which the patent can be set aside.

On this day, after consideration, the judges thus delivered their respective opinions.

ROOKE, J., after stating the special case at length, thus proceeded. From this state of the case, and from the admission of counsel on both sides, I assume the following facts, *viz.* that the Plaintiff *Watt* is the inventor of a new and useful improvement in fire engines, whereby the consumption of steam, and consequently of fuel is considerably lessened: that the improvement is of such a nature that it may legally be the object of protection by royal patent: that a patent has been granted to the inventor, on the condition of a specification of the nature of the invention: that a specification has been made, sufficient to enable a mechanic to construct fire engines containing the improvement invented by the patentee: and that the Legislature six years

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years after the patent had been granted, thought proper to extend the duration of it from the eight years then to come, to twenty-five years, the patent having been granted in the ninth, and the statute having passed in the fifteenth year of the present king.

Under these circumstances, I think I conform to the spirit of the stat. 21 *Jac.* 1. c. 3. s. 6, if I incline to support this patent, provided it may be supported without violating any rule of law: and I think so for two reasons, first, because the patentee is substantially intitled to the protection of the patent, and secondly because the public are sufficiently instructed, and will be duly benefited by the specification. Against the claim of the patentee certain objections have been made, which, it is contended, deprive him of all legal right to that protection. First, it is objected that the patent is not for fire engines upon the particular construction which contains this new improvement, but for a new invented method of lessening the consumption of steam and fuel: secondly, it is objected, that no particular engine is described in this specification, but that it only sets forth the principles: and the last objection is, that the statute has not duly prolonged the patent, because the patent is for a *method*, and the statute for an *engine*. It is obvious that these objections are merely formal: they do not affect the substantial merits of the patentee, nor the meritorious consideration which the public have a right to receive, in return for the protection which the patentee claims. With regard to the first objection, it is that the patent is not for a fire engine of a particular construction, but for a new invented method. It pre-supposes the existence of the fire engine, and gives a monopoly to the patentee of his new invented method of lessening the consumption of steam and fuel in fire engines. The obvious meaning of those words is, that he has made an improvement in the construction of fire engines, for what does *method* mean but *mode* or *manner of effecting*? What method can there be of saving steam or fuel in engines, but by some variation in the construction of them? A *new invented method* therefore conveys to my understanding the idea of a *new mode of construction*. I think those words are tantamount to *fire engines of a newly invented construction*; at least I think they will bear this meaning, if they do not necessarily exclude every other. The specification shews that this was the meaning

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ing of the words as understood by the patentee, for he has specified a new and particular mode of constructing fire engines. If he has so understood the words, and they will bear this interpretation, then I think this objection, which is merely verbal, is answered. To which I add, that patents for a method or art of doing particular things have been so numerous, according to the lists left with us, that *method* may be considered as a common expression in instruments of this kind. It would therefore be extremely injurious to the interests of patentees, to allow this verbal objection to prevail. As to the second objection, that no particular engine is described, that no model or drawing is set forth, I hold this not to be necessary, provided the patentee so describes the improvement as to enable artists to adopt it when his monopoly expires. The jury find that he has so described it. It is objected, that he professes to set forth principles only; but we are not bound by what he professes to do, but by what he has really done. If he had professed to set forth a full specification of his improvement, and had not set it forth intelligibly, his specification would have been insufficient, and his patent void. It seems therefore but reasonable, that if he sets forth his improvement intelligibly, his specification should be supported, though he professes only to set forth the principle. The term *principle* is equivocal; it may denote either the radical elementary truths of a science, or those consequential axioms which are founded on radical truths, but which are used as fundamental truths by those who do not find it expedient to have recourse to first principles. The radical principles on which all steam engines are founded, are the natural properties of steam, its expansiveness and condensibility. Whether the machines are formed in one shape or another, whether the cylinder is kept hot or suffered to cool, whether the steam is condensed in one vessel or another, still the radical principles are the same. When the present patentee set his inventive faculties to work, he found fire engines already in existence, and the natural qualities of steam already known and mechanically used. He only invented an improvement in the mechanism, by which they might be employed to greater advantage. There is no newly discovered natural principle as to steam, nor any new mechanical principle in his machine; the only invention is a new mechanical employment of principles already known. As to the specification, some
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part of it, so much as represents the future intentions of the patentee, may be considered, according to the language of the specification, as merely theoretical; but the greater part describes a practical use of improved mechanism, the basis on which the improvement is founded. The object of the patentee was to condense the steam without cooling the cylinder: the means adopted to effectuate this were to enclose the cylinder in a case which will confine the heat or transmit it slowly, to surround it with steam or other heated bodies, and to suffer neither water nor any other substance colder than the steam, to enter or touch it during that time. These means are set forth. The objection is, that there is no drawing or model of a particular engine; and where is the necessity of such drawing or model, if the specification is intelligible without it? Had a drawing or model been made, and any man copied the improvement, and made a machine in a different form, no doubt this would have been an infringement of the patent. Why? Because the *mechanical improvement* would have been introduced into the machine, though the form was varied. It follows from thence, that the *mechanical improvement*, and *not the form* of the machine, is the object of the patent; and if this mechanical improvement is intelligibly specified, of which a jury must be the judges, whether the patentee call it a principle, invention, or method, or by whatever other appellation, we are not bound to consider his terms, but the real nature of his improvement, and the description he has given of it, and we may I think protect him without violating any rule of law. As to the articles of the specification which denote intention only, and do not state the thing to which it is to be applied, I do not think he could maintain an action for breach of these articles; for he cannot anticipate the protection, before he is entitled to it by practical accomplishment. But the patent is for a method already adopted, and the two first and most material articles are set forth as already accomplished, and the case states it was new and useful at the time of making the patent. I therefore consider the most essential part of the patent, the keeping the cylinder hot, inclosing it in a case, and surrounding it with steam, as carried into practical effect at the time of granting the patent; this the Defendant has infringed; and I will presume after verdict, where nominal damages only are given, that the evidence was applied to, and the

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the damages given for those articles only which are well specified. Now if he has infringed those articles which are well specified, he shall not be excused from an action, because he has been guilty of an additional infringement on that which is specified as matter of intention only. As to the objection of the want of a drawing or model, that at first struck me as of great weight. I thought it would be difficult to ascertain what was an infringement of a method, if there was no additional representation of the improvement, or thing methodized. But I have satisfied my mind thus: infringement or not, is a question for the jury; in order to decide this case, they must understand the nature of the improvement or thing infringed; if they can understand it without a model, I am not aware of any rule of law which requires a model or a drawing to be set forth, or which makes void an intelligible specification of a mechanical improvement, merely because no drawing or model is annexed. In the present case, I do not hear that the want of a drawing or a model occasioned any difficulty to the jury; they have expressly decided that Mr. *Watt* has the merit of a new and an useful invention, and that this invention was infringed by the Defendant. How then can I say, that they could not understand it for the want of a drawing? Especially when they have added, that the specification is sufficient to enable a mechanic acquainted with the fire-engines previously in use, to construct fire-engines producing the effect of lessening the consumption of fuel and steam, upon the principle invented by the Plaintiff. For these reasons I think the second objection, that no particular engine is set forth, is not of sufficient weight to destroy the effect of the patent.

HEATH, J. This patent is expressly for a new invented method for lessening the consumption of steam and fuel in fire-engines. It appears that the invention of the patentee is original, and may be the subject of a patent; but the question is, inasmuch as this invention is to be put in practice by means of machinery, whether the patent ought not to have been for one or more *machines*, and whether this is such a specification as entitles him to the monopoly of a *method*? If *method* and *machinery* had been used by the patentee as convertible terms, and the same consequences would result from both, it might be too strong to say, that the inventor should lose the benefit of his patent, by the misapplication of his term. In truth it is

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not so. His counsel have contended for the exclusive monopoly of a *method* of lessening the consumption of steam and fuel in fire-engines, and that therefore would better answer the purposes of the patentee, for the method is a principle reduced to practice; it is in the present instance the general application of a principle to an old machine. There is no doubt that the patentee might have obtained a patent for his machinery, because the act of parliament he obtained acknowledged his patent, and he himself in 1782 procured a patent for his invention of certain new improvements upon steam and fire engines for raising water &c., which contained new pieces of mechanism, applicable to the same. Upon this statement the following objections arise to the patent, which I cannot answer: namely that if there may be two different species of patents, the one for an application of a principle to an old machine, and the other for a specific machine, one must be good and the other bad. The patent that admits the most lax interpretation should be bad, and the other alone conformable to the rules and principles of common law, and to the statute on which patents are founded. The statute 21 *Jac.* 1. prohibits all monopolies, reserving to the king by an express proviso so much of his ancient prerogative, as shall enable him to grant letters patent and grants of privilege, for the term of fourteen years or under, of the sole working or making of any manner of *new manufactures* within this realm, to the true and first inventor and inventors of such *manufactures*. What then falls within the scope of the proviso? Such manufactures as are reducible to two classes. The first class includes machinery, the second [482] substances (such as medicines) formed by chemical and other processes, where the vendible substance is the thing produced, and that which operates preserves no permanent form. In the first class the machine, and in the second the substance produced, is the subject of the patent. I approve of the term *manufacture* in the statute, because it precludes all nice refinements; it gives us to understand the reason of the proviso that it was introduced for the benefit of trade. That which is the subject of a patent, ought to be specified, and it ought to be that which is vendible, otherwise it cannot be a manufacture. This is a new species of manufacture, and the novelty of the language is sufficient to excite alarm. It has been urged that other patents have been litigated and established; for instance *Dollond's*,

Dellond's, which was for a refracting telescope. I consider that as substantially an improved machine. A patent for an improvement of a refracting telescope, and a patent for an improved refracting telescope, are in substance the same. The same specification would serve for both patents, the new organization of parts is the same in both. I asked in the argument for an instance of a patent for a *method*, and none such could be produced. I was then pressed with patents for chemical processes, many of which are for a *method*, but that is from an inaccuracy of expression, because the patent in truth is for a vendible substance. To pursue this train of reasoning still further, I shall consider how far the arguments in support of this patent will apply to the invention of original machinery founded on a new principle. The steam engine furnishes an instance. The Marquis of *Worcester* discovered in the last century, the expansive force of steam, and first applied it to machinery. As the original inventor he was clearly entitled to a patent. Would the patent have been good applied to all machinery, or to the machines which he had discovered? The patent decides the question. It must be for the vendible matter, and not for the principle. Another objection may be urged against the patent, upon the application of the principle to an old machine, which is, that whatever machinery may be hereafter invented would be an infringement of the patent, if it be founded on the same principle. If this were so it would reverse the clearest positions of law respecting patents for machinery, by which it has been always holden, that the organization of a machine may be the subject of a patent, but principles cannot. If the argument for the patentee were correct, it would follow, that where a patent was obtained for the principle, the organization would be of no consequence. Therefore the patent for the application of the principle must be as bad as the patent for the principle itself. It has been urged for the patentee, that he could not specify all the cases, to which his machinery could be applied. The answer seems obvious, that what he cannot specify, he has not invented. The finding of the jury that steam engines may be made upon the principle stated by the patentee, by a mechanic acquainted with the fire-engines previously in use, is not conclusive. This patent extends to all machinery that may be made on this principle, so that he has taken a patent for more than he has specified;

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specified; and as the subject of his patent is an entire thing, the want of a full specification is a breach of the conditions, and avoids the patent. Indeed it seems impossible to specify a principle, and its application to all cases, which furnishes an argument that it cannot be the subject of a patent. It has been usual to examine the specification, as a condition on which the patent was granted. I shall now consider it in another point of view. It is a clear principle of law that the subject of every grant must be certain. The usual mode has been for the patentee to describe the subject of it by the specification; the patent and the specification must contain a full description. Then in this, as in most other cases, the patent would be void for the uncertain description of the thing granted, if it were not aided by the statute. The grant of a method is not good, because uncertain, the specification of a method or the application of principle is equally so, for the reasons I have alleged.

BULLER, J. Few men possess more ingenuity, or have greater merit with the public, than the Plaintiffs on this record; and if their patent can be sustained in point of law, no man ought to envy them the profits and advantages arising from it. Even if it cannot be supported, no man ought to envy them the profits which they have received; because the world has undoubtedly derived great advantages from their ingenuity. We are called upon to deliver our opinions on the dry question of law, whether upon the case disclosed to us, this patent can or cannot be sustained. And I shall deliver my opinion first upon the case itself, and secondly on the arguments which have been urged at the bar.

[484] The case states the Plaintiffs' patent, the specification, and the act of parliament. It gives a description of the old engine, and then states that the invention of the Plaintiffs is a new and useful one, and that the specification is sufficient to enable a mechanic to construct fire-engines, producing the effect of lessening the consumption of fuel and steam in fire-engines, upon the principle invented by Mr. *Watt*. One objection made by the Defendant was, that it did not appear on the case, that a mechanic could, from the specification, construct an engine which should lessen the consumption of fuel and steam, with equal effect, or to the same extent as Mr. *Watt* himself did. If the negative appeared, *viz.* that a mechanic could not from the specification make an engine with equal effect, or if it
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required expense and experiments before it could be done, I agree that either of those facts would avoid the patent. But that is not so stated; and upon this case I think we are bound to say there is no foundation for either of those objections. There is another objection to the case, which I think more important, and that is, that the jury have not told us wherein the invention consists, whether it be in an additional cylinder, or other vessel to the old machine, or what the addition is, or whether it be only in the application of the old parts of the machine, or in what is called at the bar, the *principle* only, or in what that principle consists. These defects have opened a great field of argument, and have driven the Plaintiffs' counsel to the necessity of endeavouring to support his case on all possible grounds. The old engine consisted of a cylinder, a boiler, a pipe which occasionally communicated between them, an injection cistern, and pumps. The two material parts of the new engine, as mentioned in the specification, are the old cylinder, now called the steam vessel, and the vessel now called the condenser, which it is said must be distinct from the steam vessel, though occasionally communicating with it. The old boiler did occasionally communicate with the cylinder. The pumps, grease and other things are admitted to be trifling circumstances, and not worthy any observation. Upon this state of the case, I cannot say that there is any thing substantially new in the manufacture; and indeed it was expressly admitted on the argument, that there were no new particulars in the mechanism: that it was not a machine or instrument which the Plaintiffs had invented: that mechanism was not pretended to be invented in any of its parts: that this engine does consist of all the same parts as the old engine: and that the particular mechanism is not necessary to be considered. The fact of there being nothing new in the engine drove the counsel to argue on very wide grounds, and to touch on the possibility of maintaining a patent for an idea or a principle, though I think it was admitted that a patent could not be sustained for an idea or a principle alone.

The very statement of what a principle is, proves it not to be a ground for a patent. It is the first ground and rule for arts and sciences, or in other words the elements and rudiments of them. A patent must be for some new production from those elements, and not for the elements themselves. The Plaintiffs' case

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case is considerably distressed in many parts of it, and as it seems to me, the arguments which have been adduced were very much calculated to keep clear of difficulties, which the counsel foresaw might be introduced into the case; as first, that unless the principle can be supported as the ground of the patent, there may be some danger of confirming the Defendant's objection to it: secondly, that unless the principle can be supported, it may open a fatal objection to the specification, because that does not state in what manner the new machine is to be constructed, how it varies from the old one, or in what way the improvements are to be added: or thirdly, because the patent embraces the whole principle, and is founded on that alone; but the invention is taken to consist of an improvement or addition only. Another objection may arise both to the patent and specification, *viz.* that the patent is granted for the whole engine, and not for the addition or improvement only. Perhaps it may be convenient and judicious to keep these objections as much as possible in the back ground, and out of the view of the court. But it is our duty to sift and dive into the facts and circumstances of the case, and the bearings and consequences of them, as far as our abilities or knowledge of the subject will admit. There is one short observation arising on this part of the case, which seems to me to be unanswerable, and that is, that if the principle alone be the foundation of the patent, it cannot possibly stand, with that knowledge and discovery which the world were in possession of before. The effect, the power, and the operation of steam were known long before the date of this patent; all machines which are worked by steam are worked on the same principle. The principle was known before, and therefore if the principle alone be the foundation of the patent, though the addition may be a great improvement, (as it certainly is,) yet the patent must be void *ab initio*. But then it was said, that though an idea or a principle alone would not support the patent, yet that an idea reduced into practice, or a practical application of a principle was a good foundation for a patent, and was the present case. The mere application or mode of using a thing, was admitted in the reply not to be a sufficient ground (a); for on the court putting the question, whether if a man by science were to devise the

(a) By an error of the press, this question and the admission in answer to it are omitted in the statement of the reply.

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means of making a double use of a thing known before, he could have a patent for that, it was rightly and candidly admitted that he could not. The method and the mode of doing a thing are the same: and I think it impossible to support a patent for a method only, without having carried it into effect and produced some new substance. But here it is necessary to inquire, what is meant by a principle reduced into practice. It can only mean a practice founded on principle, and that practice is the thing done or made, or in other words the manufacture which is invented.

This brings us to the true foundation of all patents, which must be the manufacture itself; and so says the statute 21 *Jac.* 1. c. 3. All monopolies except those which are allowed by that statute, are declared to be illegal and void; they were so at common law, and the sixth section excepts only those of the sole working or making any manner of *new manufacture*: and whether the manufacture be with or without principle, produced by accident or by art, is immaterial. Unless this patent can be supported for the *manufacture*, it cannot be supported at all. I am of opinion that the patent is granted for the *manufacture*, and I agree with my Brother *Adair* that verbal criticisms ought not to avail, but that *principle* in the patent and *engine* in the act of parliament mean and are the same thing. Besides, the declaration is founded on a right to the engine, and therefore, unless the Plaintiffs can make out their right to that extent, they must fail. In most of the instances of the different patents mentioned by my Brother *Adair*, the patents were for the manufacture, and the specification rightly stated the method by which the manufacture was made: but none of them go the length of proving, that a method of doing a thing without the thing being done or actually reduced into practice, is a good foundation for a patent. When the thing is done or produced, then it becomes the manufacture which is the proper subject of a patent. *Dollond's* patent was for object-glasses, and the specification properly stated the method of making those glasses. And as I mentioned in the course of the argument, the point contested in that case was, whether *Dollond* or *Hall* was the first and true inventor within the meaning of the statute, *Hall* having first made the discovery in his own closet, but never made it public; and on that ground, *Dollond's* patent was confirmed. Mechanical and chemical discoveries all come within the description of manufactures: and it is no objection

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jection to either of them that the articles of which they are composed were known and were in use before, provided the compound article which is the object of the invention, is new. But then the patent must be for the *specific compound*, and not for all the articles or ingredients of which it is made. The first inventor of a fire-engine could never have supported a patent for the method and principle of using iron. Nor could Dr. *James* (supposing his patent had been clear of other objections) have sustained a patent for the method and principle of using antimony. In the first case, the patent must have been for the fire-engine, *eo nomine*; and in the second, for the specific compound powder. Suppose the world were better informed than it is, how to prepare Dr. *James's* fever powder, and an ingenious physician should find out that it was a specific cure for a consumption, if given in particular quantities; could he have a patent for the sole use of *James's* powder in consumptions or to be given in particular quantities? I think it must be conceded that such a patent would be void; and yet the use of the medicine would be new, and the effect of it as materially different from what is now known, as life is from death. So in the case of a late discovery, which as far as experience has hitherto gone, is said to have proved efficacious, that of the medicinal properties of arsenic in curing agues, could a patent be supported for the sole use of arsenic in aguish complaints? The medicine is the manufacture, and the only object of a patent, and as the medicine is not new, any patent for it, or for the use of it, would be void. The case of water tabbies which has often been mentioned in *Westminster* [488] *Hall*, may afford some illustration of this subject. That invention first owed its rise to the accident of a man's spitting on a floor cloth, which changed its colour, from whence he reasoned on the effect of intermixing water with oils or colours, and found out how to make water tabbies, and had his patent for water tabbies only. But if he could have had a patent for the principle of intermixing water with oil or colours, no man could have had a patent for any distinct manufacture, produced on the same principle. Suppose painted floor cloths to be produced on the same principle, yet as the floor cloth and the tabby are distinct substances, calculated for distinct purposes, and were unknown to the world before, a patent for one would be no objection to a patent for another.

The true question in this case is, whether the Plaintiffs' patent

patent can be supported for the engine? I have already said I consider it as granted for the engine, and if that be the right construction of the patent, that alone lays all the arguments about ideas and principles out of the case. The objections to this patent, as a patent for the engine, are two: first, that the fire-engine was known before: and secondly, though the Plaintiffs' invention consisted only of an improvement of the old machine he has taken the patent for the whole machine, and not for the improvement alone. As to the first, the fact which the Plaintiffs' counsel were forced to admit, and did repeatedly admit in the terms which I mentioned, viz. that there was nothing new in the machine, is decisive against the patent. And the second objection is equally fatal. That a patent for an addition or improvement may be maintained, is a point which has never been directly decided; and *Bircot's case* 3 *Inst.* 184. is an express authority against it, which case was decided in the Exchequer Chamber. What were the particular facts of that case we are not informed, and there seems to me to be more quaintness than solidity in the reason assigned, which is, that it was to put but a new button to an old coat, and it is much easier to add than to invent. If the button were new, I do not feel the weight of the objection that the coat on which the button was to be put, was old. But in truth arts and sciences at that period were at so low an ebb, in comparison with that point to which they have been since advanced, and the effect and utility of improvements so little known, that I do not think that case ought to preclude the question. In later times, whenever the point has arisen, the inclination of the court has been in favour of the patent for the improvement, and the parties have acquiesced, where the objection might have been brought directly before the court. In *Morris v. Branson* which was tried at the sittings after *Easter* term 1776, the patent was for making oilet holes or net work in silk, thread, cotton, or worsted; and the Defendant objected that it was not a new invention, it being only an addition to the old stocking frame. Lord *Mansfield* said "after one of the former
 " trials on this patent, I received a very sensible letter from one
 " of the gentlemen who was upon the jury, on the subject
 " whether on principles of public policy, there could be a
 " patent for an addition only. I paid great attention to it,
 " and mentioned it to all the judges. If the general point of
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“ law, viz. that there can be no patent for an addition, be with
 “ the Defendant, that is open upon the record, and he may
 “ move in arrest of judgment. But that objection would go to
 “ repeal almost every patent that was ever granted.” There
 was a verdict for the Plaintiffs with 500*l.* damages, and no
 motion was made in arrest of judgment. Though his Lord-
 ship did not mention what were the opinions of the judges, or
 give any direct opinion himself, yet we may safely collect that
 he thought on great consideration, the patent was good, and the
 Defendant’s counsel, though they had made the objection at
 the trial, did not afterwards persist in it. Since that time, it
 has been the generally received opinion in *Westminster Hall*,
 that a patent for an *addition* is good. But then it must be for
 the *addition only*, and not for the old machine too. In *Jessop’s*
case, as quoted by my Brother *Adair*, the patent was held to be
 void because it extended to the whole watch, and the invention
 was of a particular movement only. It was admitted in the reply,
 that the patent should be applied to the invention itself: but it
 was contended, that if in consequence the patent gave a right to
 the whole engine, that would be no objection. To this I answer,
 that if the patent be confined to the *invention*, it can give no right
 to the *engine*, or to any thing beyond the invention itself. Where
 a patent is taken for an improvement only, the public have a
 right to purchase that improvement by itself, without being in-
 cumbered with other things. A fire-engine of any considerable
 size, I take it, would cost about 1200*l.* and suppose the alter-
 ation made by the Plaintiff, with a fair allowance for profit would
 cost 50 or 100*l.* is it to be maintained, that all the persons who
 already have fire-engines must be at the expence of buying new
 ones from the Plaintiffs, or be excluded from the use of the
 improvement? So in the case of the watch, may not other per-
 sons in the trade buy the new movement, and work it up in
 watches made by themselves? Where men have neither fire-
 engines nor watches, it is highly probable that they will go to
 the inventor of the last and best improvements for the whole
 machine; and if they do, it is an advantage which the inventor
 gets from the option of mankind, and not from any exclusive
 right or monopoly vested in him. But here the Plaintiffs claim
 the right to the whole machine. To that extent their right
 cannot be sustained, and therefore I am of opinion that there
 ought to be judgment for the Defendant.

Lord

Lord Chief Justice EYRE. Upon this case two questions are reserved for the opinion of the court; the first, whether the patent is good in law, and continued by the act of parliament mentioned in the case; the second, whether the specification stated in the case is in point of law sufficient to support the patent? As I take it, the facts of the case are stated with a view to the application of them to these questions, and not to any other question which may be thought to arise upon them. Perhaps indeed, if the court saw that another material question might arise out of these facts which had escaped the attention of the court and jury at *Nisi Prius*, they might direct the case to be amended or a new trial to be had in order to introduce it. These two questions were thus stated in order to bring before the court the points of law insisted on upon the part of the Defendant, and also to give an opportunity for considering a doubt which occurred to me upon my first view of the case at the trial, which was, whether a patent right could attach upon any thing not organized, and capable of precise specification. As these two questions are framed, there are three points for the consideration of the court. First, whether the patent was in its original creation good or bad? Secondly, taking it to be good, whether it was continued by the act of parliament? And thirdly, taking it to be good in its original creation, and to have been continued by the act of parliament, subject to an objection for the want of a specification, whether there has been a sufficient specification? Though we have had many cases upon patents yet I think we are here upon ground which is yet untrodden, at least was untrodden till this cause was instituted, and till the discussions were entered into which we have heard at the bar, and now from the court. Patent rights are no where that I can find accurately discussed in our books. Sir *Edward Coke* discourses largely, and sometimes not quite intelligibly, upon monopolies, in his chapter of monopolies, 3 *Inst.* 181. But he deals very much in generals, and says little or nothing of patent rights, as opposed to monopolies. He refers principally to his own report of the case of monopolies. 11 *Co.* 86 *b.*; he also mentions a resolution of all the judges in 2 & 3 *Eliz.* from a *MS.* of *Dyer*, condemning a grant to the corporation of *Southampton* by *Phillip* and *Mary*, for the sole right of importing malmsey wine, and that no malmsey wine should be landed at any other place, upon pain

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pain to pay treble customs. He also mentions *Bircot's* case in the Exchequer Chamber, 15 *Eliz.* for a privilege concerning the preparing and melting of lead ore, but he states no particulars; and the principle on which that case was determined has been, as my Brother *Buller* observes, not adhered to; namely, that an addition to a manufacture cannot be the subject of a patent. There is also a case in *Godbolt (a)*, and there are a few others condemning particular patents, which were beyond all doubt mere monopolies. The modern cases have chiefly turned upon the specifications, whether there was a fair disclosure. Such was the case of *Turner v. Winter*, 1 *Term Rep. B. R.* 602. The case of *Edgeberry v. Stephens*, 2 *Salk.* 447. is almost the only case upon the patent right, under the saving of the statute of *Jac.* 1. that is to be found. That case establishes, that the first introducer of an invention practised beyond sea, shall be deemed the first inventor: and it is there said, the act intended to encourage new devices useful to the kingdom; and whether acquired by travel or study it is the same thing. Deriving so little assistance from our books, let us resort to the statute itself, 21 *Jac.* 1. *c.* 3. We shall there find a *monopoly* defined to be "the privilege of the sole buying, selling, making, working or using any thing within this realm;" and this is generally condemned as contrary to the fundamental law of the land. But the 5th and 6th sections of that statute save letters patent, and grants of privileges of the sole working or making of any manner of *new manufacture* within this realm, to the first and true inventor or inventors of such *manufactures*, with this qualification, "so they be not contrary to the law, nor mischievous to the state", in these three respects: first, "by raising the prices of commodities at home"; secondly, "by being hurtful to trade"; or, thirdly, by being "generally inconvenient." According to the letter of the statute, the saving goes only to the *sole working* and *making*; the *sole buying, selling* and *using*, remain under the general prohibition; and with apparent good reason for so remaining, for the exclusive privilege of *buying, selling* and *using*, could hardly be brought within the qualification of not being contrary to law, and mischievous to the state, in the respects which I have mentioned. I observe also, that according to the letter of the statute, the words "*any manner of new manufacture*" in the sav-

(a) *Godb.* 252. The Cloth-workers of *Ipswich's* case, *ib.* 413. Lord *Zouch* and *More's* case.

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ing, fall very short of the words "*any thing*" in the first section. But most certainly the exposition of the statute, as far as usage will expound it, has gone very much beyond the letter. In the case in *Salkeld*, the words "*new devices*" are substituted and used as synonymous with the words "*new manufacture*." It was admitted in the argument at the bar, that the word "*manufacture*" in the statute was of extensive signification, that it applied not only to things made, but to the *practice of making*, to principles carried into practice in a new manner, to new results of principles carried into practice. Let us pursue this admission. Under *things made*, we may class, in the first place, new compositions of things, such as manufactures in the most ordinary sense of the word; secondly, all mechanical inventions, whether made to produce old or new effects, for a new piece of mechanism is certainly a thing made. Under the *practice of making* we may class all new artificial manners of operating with the hand, or with instruments in common use, new processes in any art producing effects useful to the public. When the effect produced is some new substance or composition of things, it should seem that the privilege of the sole working or making, ought to be for such new substance or composition, without regard to the mechanism or process by which it has been produced, which, though perhaps also new, will be only useful as producing the new substance. Upon this ground *Dollond's* patent was perhaps exceptionable, for that was for a *method* of producing a new object-glass, instead of being for the object-glass produced. If Dr. *James's* patent had been for his *method of preparing* his powders, instead of the *powders themselves*, that patent would have been exceptionable upon the same ground. When the effect produced is no substance or composition of things, the patent can only be for the mechanism if new mechanism is used, or for the process, if it be a new method of operating, with or without old mechanism, by which the effect is produced. To illustrate this. The effect produced by Mr. *David Hartley's* invention for securing buildings from fire is no substance or composition of things; it is a mere negative quality, the absence of fire. This effect is produced by a new method of disposing iron plates in buildings. In the nature of things the patent could not be for the effect produced. I think it could not be for the making of the plates of iron, which, when disposed in a particular manner produced the effect, for those
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are things in common use. But the invention consisting in the *method of disposing of those plates of iron*, so as to produce their effect, and that effect being a useful and meritorious one, the patent seems to have been very properly granted to him for *his method* of securing buildings from fire. And this compendious analysis of *new manufactures* mentioned in the statute, satisfies my doubt, whether any thing could be the subject of a patent, but something organized and capable of precise specification. But for the more satisfactory solution of the other points which are made in this case, I shall pursue this subject a little further. In Mr. *Hartley's* method, plates of iron are the means which he employs; but he did not invent those means, the invention wholly consisted in the new manner of *using*, or I would rather say, of *disposing a thing in common use*, and which thing every man might make at his pleasure, and which therefore, I repeat, could not, in my judgment, be the subject of the patent. In the nature of things it must be, that in the carrying into execution any new invention, use must be made of certain means proper for the operation. Manual labour to a certain degree must always be employed; the tools of artists frequently; often things manufactured, but not newly invented, such as *Hartley's* iron plates; all the common utensils used in conducting any process, and so up to the most complicated machinery that the art of man ever devised. Now let the merit of the invention be what it may, it is evident that the patent in almost all these cases cannot be granted for the *means* by which it *acts*, for in them there is nothing new, and in some of them nothing capable of appropriation. Even where the most complicated machinery is used, if the machinery itself is not newly invented, but only conducted by the skill of the inventor, so as to produce a new effect, the patent cannot be for the machinery. In *Hartley's* case it could not be for the *effect* produced, because the effect, as I have already observed, is merely negative, though it was meritorious. In the list of patents with which I have been furnished, there are several for *new methods* of manufacturing articles in common use, where the sole merit and the whole effect produced are the saving of time and expence, and thereby lowering the price of the article, and introducing it into more general use. Now I think these *methods* may be said to be *new manufactures*, in one of the common acceptations of the word, as we speak of the manufactory of glass, or any other thing

thing of that kind. The advantages to the public from improvements of this kind, are beyond all calculation important to a commercial country, and the ingenuity of artists who turn their thoughts towards such improvements, is in itself deserving of encouragement; and in my apprehension it is strictly agreeable to the spirit and meaning of the statute *Jac. 1.* that it should be encouraged: and yet the validity of these patents, in point of law, must rest upon the same foundation as that of *Mr. Hartley*. The patent cannot be for the effect produced, for it is either no substance at all, or what is exactly the same thing as to the question upon a patent, no new substance, but an old one, produced advantageously for the public. It cannot be for the mechanism, for there is no new mechanism employed. It must then be *for the method*; and I would say, in the very significant words of Lord *Mansfield*(a) in the great case of the copy-right, it must be for *method* detached from all physical existence whatever. And I think we should well consider what we do in this case, that we may not shake the foundation upon which these patents stand. Probably I do not over-rate it when I state that two-thirds, I believe I might say three-fourths, of all patents granted since the statute passed, are for *methods* of *operating* and of manufacturing, producing no new substances and employing no new machinery. If the list were examined, I dare say there might be found fifty patents for methods of producing all the known salts, either the simple salt, or the old compounds. The different sorts of ashes used in manufactures are many of them inventions of great merit, many of them probably mere speculations of wild projectors: the latter ought to fall, the former to stand. If we wanted an illustration of the possible merit of a new method of operating with old machinery, we might look to the identical case now in judgment before the court. If we consider into what general use fire-engines are come, that our mines cannot be worked without them, that they are essentially necessary to the carrying on many of our principal manufactures, that these engines are worked at an enormous expence in coals, which in some parts of the kingdom can with difficulty be procured at all in large quantities, it is most manifest that any method found out for lessening the consumption of steam in the engines, which by necessary consequence lessens the consumption of coals expended in working

(a) 4 Barr. 2397.

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them, will be of great benefit to the public, as well as to the individual who thinks fit to adopt it. And shall it now be said, after we have been in the habit of seeing patents granted, in the immense number in which they have been granted for *methods of using old machinery*, to produce substances that were old, but in a more beneficial manner, and also for producing negative qualities by which benefits result to the public, by a narrow construction of the word *manufacture* in this statute, that there can be no patent for *methods* producing this new and salutary effect, connected, and intimately connected as it is, with the trade and manufactures of the country? This, I confess, I am not prepared to say. An improper use of the word *principle* in the specification set forth in this case has, I think, served to puzzle it. Undoubtedly there can be no patent for a mere principle, but for a principle so far embodied and connected with corporeal substances as to be *in a condition to act*, and to *produce effects* in any art, trade, mystery, or manual occupation, I think there may be a patent. Now this is, in my judgment, the thing for which the patent stated in the case was granted, and this is what the specification describes, though it *miscalls it a principle*. It is not that the patentee has conceived an abstract notion that the consumption of steam in fire-engines may be lessened, but he has discovered a *practical manner* of doing it; and for that *practical manner of doing it* he has taken this patent. Surely this is a very different thing from taking a patent for a principle; it is *not for a principle*, but *for a process*. I have dwelt the more largely upon this part of the case because, in my apprehension, this is the foundation upon which the whole argument will be found to rest. If upon the true construction of the statute there may be a patent for a new method of manufacturing or conducting chemical processes, or of working machinery, so as to produce new and useful effects, then I am warranted to conclude that this patent was in its original creation good. I will next consider the specification, before I proceed to the consideration of the question arising upon the statute for continuing this patent. The specification has reference to the patent, and not to the statute, and therefore it will be proper to consider it in this stage of the argument. I distinctly admit that if this patent is to be taken to be a patent for a fire-engine, the specification is not sufficient; it is not a specification of mechanism of any determinate form, having component parts capable

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capable of precise arrangement, and of particular description. On the other hand, if the patent is not for a fire-engine, but in effect for *a manner of working a fire-engine, so as to lessen the consumption of steam*, which, as I conceive, the words of the patent import, let us see whether this specification does not sufficiently describe a manner of working fire-engines, so as to produce the effect expressed in the patent, and whether the only objection to the specification is not that it is loaded with a redundancy of superfluous matter. The substance of the invention is a discovery, that the condensing the steam out of the cylinder, the protecting the cylinder from the external air, and keeping it hot to the degree of steam-heat, will lessen the consumption of steam. This is no abstract principle, it is in its very statement clothed with practical application. It points out what is *to be done* in order to lessen the consumption of steam. Now the specification of such a discovery seems to consist in nothing more than saying to the constructor of a fire-engine, “for the future condense your steam out of the body of the cylinder, instead of condensing it within it, put something round the cylinder to protect it from the external air, and to preserve the heat within it, and keep your piston air-tight without water.” Any particular manner of doing this one should think would hardly need to be pointed out, for it can scarcely be supposed, that a workman capable of constructing a fire engine would not be capable of making such additions to it as should be necessary to enable him to execute that which the specification requires him to do. But if a very stupid workman should want to know how to go about this improvement, and in answer to his question was directed to conduct the steam which was to be condensed from the cylinder into a close vessel, by means of a pipe and a valve, communicating with the cylinder and the close vessel, to keep the close vessel in a state of coldness sufficient to produce condensation, and to extract from it any part of the steam which might not be condensed by the pump; and was also told to inclose the cylinder in a wooden case, and to use a resinous substance instead of water to keep the piston air-tight, can it be imagined that he would be so stupid as not to be able to execute this improvement, with the assistance of these plain directions? If any man could for a moment imagine that this was possible, I observe that this difficulty is put an end to, because the jury have found that a workman can execute this im-

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provement in consequence of the specification. Some machinery it is true must be employed, but the machinery is not of the essence of the invention but incidental to it. The steam must pass from the cylinder to the condensing vessel, for which purpose there must be a valve to open a pipe to convey, and a vessel to receive the steam. But this cannot be called new invented machinery, whether considered in the parts or in the whole, and therefore there can be no patent for this addition to the fire-engines. Suppose a new invented chemical process, and the specification should direct that some particular chemical substance should be poured upon gold in a state of fusion, it would be necessary, in order to this operation, that the gold should be put into a crucible, and should be melted in that crucible, but it would be hardly necessary to state in the specification the manner in which, or the utensils with which the operation of putting gold into a state of fusion was to be performed. They are mere incidents with which every man acquainted with the subject is familiar. Some observations were made in the course of the argument at the bar, on its being left unascertained both in the specification and case, to what extent the consumption of steam would be lessened by the invention; but the method does not profess to ascertain this: it professes to lessen the consumption; and to make the patent good, the method must be capable of lessening the consumption to such an extent as to make *the invention useful*. More precision is not necessary, and absolute precision is not practicable. The quantity of steam which will be saved in each machine must depend upon a great variety of circumstances respecting each individual fire-engine, such as the accuracy of casting or boring the cylinder, or the dimensions of it, the accuracy of the workman in putting his apparatus together, the care in keeping the cylinder in a proper degree of heat, and the more or less perfect order for working, in which the engine is kept. All these circumstances will affect the quantity of steam to be lessened. Some weighty observations have been made upon parts of this specification, but those parts appear to me not properly to relate to the method described in the patent; they are rather intimations of new projects of improvement in fire-engines, and some of them, I am very ready to confess, either very loosely described or not very accurately conceived. I do not undertake to pronounce which, but one or the other is pretty

pretty clear. They are the fourth and fifth articles : the first, second, third and sixth appear to me to belong to this method, and very clearly to point out and explain the method to every man who has a common acquaintance with the subject, and to be intelligible even to those who are unacquainted with it. If there be a specification to be found in that paper, which goes to the subject of the invention as described in the patent, I think the rest may very well be rejected as superfluous. If indeed the Defendant could have shewn that he had not pirated the invention which is sufficiently specified, but that what he hath done hath a reference to another method of lessening the consumption of steam to which the questionable parts of the specification were meant to relate, the objection to the specification would have remained, and perhaps some other objections which have been alluded to, might have been taken both to the patent and specification. But I would observe here, that with regard to this and some other difficulties, there is no question reserved in this case respecting the infringement of the patent. The general fact only is stated ; that it has been infringed by the Defendant and in the consideration of a case reserved, we are not to search for difficulties upon which the parties have not proposed to state any point to us for our judgment, and into which I think we are not at liberty to go. The difficulty which struck me, as it did my Brother *Buller*, with respect to the declaration, is applied to the patent as it originally stood, not as it now stands continued by the act of parliament. If we were at liberty to go into it, that difficulty might perhaps produce a nonsuit, and that nonsuit a new action in which the difficulty would be removed. But this cause was instituted to try the merits of the patent : I thought therefore that a formal objection was wisely overlooked. Supposing then the difficulty upon the patent itself and the specification to be got over, the act of parliament remains to be considered. The objection stated in the strongest manner would amount to this, that the act continues a patent for a *machine*, when in fact the patent is for a *process*. It is to be observed that there is ~~nothing~~ technical in the composition or the language of an act of parliament. In the exposition of statutes the intent of parliament is the guide. It is expressly laid down in our books, I do not here speak of penal statutes, that every statute ought to be expounded not according to the letter, but

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the intent. 2 *Roll. Abr.* 118., *Plowd.* 350. 363. This doctrine has been carried into effect by cases. Though a corporation be misnamed in an act of parliament, if it appears that the corporation was intended it is sufficient. 10 *Co.* 5 *b.* So the statute of *quia emptores terrarum* has said that every one shall hold of the lord paramount *secundum quantitatem terræ*, but this shall be construed to be *secundum valorem terræ*; for so was the intent. *Plowd.* 10. 57. We all know that an act of parliament may be extended by equity. No authority has been cited which amounts to proof that a mistake in point of description in an act of parliament of this nature when the true meaning can be discovered, and when there is a foundation on which the act can be supported, shall vitiate it. The case cited from *Plowden* differs essentially from this case. The act of parliament in that case gave effect to a supposed legal attainder, and proceeded upon it altogether. If the ground-work fell, and there was no legal attainder, nothing remained: the supposed attainder in that case fell, consequently all fell. Now the difference between that case and the present is this, here the true patent meant to be described exists, and may
[500] therefore be a ground-work to support the act. This case was compared to the case of the king being deceived in his grant. But I am not satisfied that the king, proceeding by and with the advice of parliament, is in that situation in respect of which he is under the special protection of the law, and that he could on that ground be considered as deceived in his grant: no case was cited to prove that position. The objection on the act of parliament is of the same nature as one of the objections to the specification: the specification calls a *method* of lessening the consumption of steam in fire-engines a *principle*, which it is not; the act calls it an *engine*, which perhaps also it is not; but both the specification and statute are referable to the same thing, and when they are taken with their correlative are perfectly intelligible. Upon the wider ground I am therefore of opinion that the act has continued this patent. A narrower ground was taken in the argument, which was to expound the word *engine* in the body of this act, in opposition to the title of it, to mean a *method*; and I am ready to say I would resort to that ground if necessary in order to support the patent, *ut res magis valeat quàm pereat*. But it is not necessary: for let it be remembered, that though monopolies in the eye of the law are odious,

odious, the consideration of the privilege created by this patent, is meritorious, because, to use the words of Lord *Coke*, “the inventor bringeth to and for the commonwealth a new manufacture by his invention, costs and charges.” I conclude therefore that the judgment of the court ought to be for the Plaintiff.

The court being thus equally divided, no judgment was given, but the parties seemed disposed to put the case upon the record, in the form of a special verdict, in order that it might be carried on to a Court of Error.

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HOLLINGWORTH and Others, Assignees of DANIEL, a
Bankrupt, *against* TOOKE.

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Saturday,
May 16th.

In the Exchequer Chamber in Error.

[See 5 Term Rep. B. R. 215.]

A WRIT of Error having been brought on the judgment in this case, it was twice argued in this court; first by *Wigley* for the Plaintiff in error, and *Walton* for the Defendant; and secondly, by *Pigot* for the Plaintiff and *Erskine* for the Defendant; the substance of which arguments will be seen by referring to the three former ones which the case underwent in the Court of King's Bench 5 Term Rep. B. R. 215. And now the judgment of this court was pronounced by

Lord Chief Justice EYRE, who, after stating the special verdict proceeded thus.

The case was well and laboriously argued at the bar. It was very full of thorny points, which necessarily required from us a good deal of investigation. The consequence has been

convenience, to cover which *A.* shall remit value to *B.* After they have acted some time under this agreement *B.* becomes bankrupt, being under acceptances to a great amount. *A.* (being ignorant of the bankruptcy) sends a quantity of goods of the same kind together with other bills to *B.* for the purpose of discharging those acceptances, which come into the hands of the assignees. *A.* afterwards himself discharges the acceptances. Under these circumstances *B.* is to be considered as the factor or banker of *A.*, and as having only a *qualified property* in the goods and bills which were so sent for a particular purpose, the general property being in *A.* Therefore that purpose not being answered, *A.* may recover back from the assignees of *B.* the amount of those goods and bills (a).

It is agreed between *A.* and *B.* that *B.* shall purchase of *A.* all the goods of a certain kind, which *A.* shall send him, at a fixed price, and that *A.* shall draw bills on *B.* for the amount of the purchase, and also that *B.* shall accept other bills drawn by *A.* for his

(a) [As to the specific appropriation of bills, see *Bent v. Puller*, 5 T. R. 494; *Parke v. Eliason*, 1 East, 544; *Giles v. Perkins*, 9 East, 12; *Carstairs v. Bates*, 3 Campb. N. P.

C. 301; *Thompson v. Giles*, 2 B. & C. 422; *Ex parte Sarjeant*, 1 Rose, 153; *Ex parte Sollars*, 18 Ves. 229; *Ex parte Pease*, 1 Rose, 232; *Ex parte Rowton*, 1 Rose, 15.]

that

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that a length of time, perhaps somewhat inconvenient to the parties, has elapsed before we could come to an agreement. We have at length come to an agreement, and we are all of opinion that this judgment ought to be affirmed. I shall state very shortly the reasons which have induced me to concur in that opinion. The right of the parties to the light gold and bills, which are the subject of this action, appears to me to depend principally upon the true construction of the original agreement between *Tooke* and *Daniel*, made two years and upwards before the bankruptcy. That agreement consisted of two parts; one being a contract for a bargain and sale of light gold by *Tooke* to *Daniel* at a given price, to be paid for by bills of exchange payable at two months, a simple and unembarrassed transaction; the other being a contract, the effect of which was that *Daniel* should become *Tooke's* banker, that he should accept his bills, *Tooke* remitting value to the amount of such acceptances in bills and in light gold. That is plainly the effect of the latter part of the agreement. They might have dealt as mere merchants, the one selling and the other buying this article of light gold, and paying for it according to agreement. And had this been a case of that kind, the transaction would have had one complexion, and the argument upon it, I think, would have taken one course. But as they might act in that manner, so they might upon the latter branch of the agreement act as principal and factor, or principal and banker, and not as mere merchants; and the idea of bargain and sale would enter no farther into their transactions upon that branch of the agreement, than merely as it went to fix the price at which the light gold which should be remitted from time to time should be carried to the account of *Tooke* as cash, and be applied by *Daniel*, as *Tooke's* agent, in payment of the acceptances which he had made on the credit of *Tooke*. There would certainly be this mixture of bargain and sale in any transactions which should take place even under the latter branch of the agreement, which in other respects would be the transaction of principal and factor, or principal and banker. But though there be this mixture, yet I think the case of the light gold cannot, in respect of that circumstance, be separated from the case of the bills. If *Daniel* was to be considered as factor or banker only with respect to the bills which should be remitted, he ought to be considered as banker or factor only,

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as to the light gold, with an agreement on his part to apply that light gold in payment of his acceptances at the rate fixed in the former part of the agreement. In a word, the bargain and sale of the light gold, when considered under the second branch of the agreement as a remittance to pay the acceptances, is but an incident in the business of the principal character of factor or banker. Now if it can be established that *Tooke* and *Daniel* acted in the characters of principal and factor, their respective rights of property are very easily ascertained: the general right of property would be in *Tooke*, the special right of property in *Daniel*, to enable him to execute the commission with which *Tooke* had entrusted him, and he would also have a lien as against the general property of his principal, for the balance of his account. In this way of considering the case, we may lay all this story of the bankruptcy entirely out of the question. For suppose *Daniel* had remained solvent, *Tooke* might at any time have paid him his balance, including any acceptances he might be under, and have withdrawn his effects out of *Daniel's* hands, and there could have been no room for a question between them, but merely as to the profit upon the light gold, estimated at the price in the agreement. Now I think that would depend upon the question whether the light gold was sold under the first part of the agreement, or whether it was to be considered as a mere article of remittance under the latter part; and according to my view of the case I think that question would be decided against *Daniel*. The assignees standing in the place of *Daniel*, certainly can be in no better condition than *Daniel* himself: they may be in a worse condition if many of the arguments which we heard at the bar, and of which we have an account in print, are well founded. But those arguments take a very wide compass indeed; they involve, as I have already said, points of considerable difficulty upon which we have not formed an opinion, and upon which perhaps an opinion ought not to be formed till the points come judicially and unavoidably before the court. If that discussion can be avoided now, I think we do our duty by delivering an opinion upon narrower grounds. The ground I have taken is very distinctly marked, and very well enforced in the argument of one of the judges of the Court of King's Bench (*a*). He concludes somewhat differently from me, but

(*a*) This probably alludes to the opinion of *Grose, J.*, 5 Term Rep. B. R. 233.
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the ground-work is there. In my opinion it may be sustained, it steers clear of all difficulties, and it reaches the substantial justice of the case, because it meets the only argument of considerable weight that struck my mind, namely, the possibility that the bankrupt might have been the creditor, and the injustice which would have been done to his estate if these effects could, on account of the bankruptcy, have been withdrawn from the mass of his estate. Now as the principle upon which my opinion proceeds is, that the bankrupt would have a lien upon those effects for every thing for which his estate was creditor, that difficulty is removed. Upon this ground I concur in thinking that the judgment in this case ought to be affirmed, and it is the unanimous opinion of the Court that the

Judgment be affirmed.

Saturday,
May 6th.

SLUBEY and SMITH *against* HEYWARD, Fox, and Fox.

A. at a foreign port, ships goods by the order and on the account of *B.* to be paid for at a future day, and bills of lading are accordingly signed by the master of the ship. One of the bills is immediately transmitted to *B.*, who before the arrival of the ship at the place of destination, sells the goods, and indorses the bill of lading to *C.* After the arrival of the ship, and a delivery of part of the goods to the agent of *C.*, *B.* becomes bankrupt without having paid *A.* the price of the goods. By this delivery the *transitus* is at an end as to the whole of the goods (*a*).

IN this action of trover for a quantity of wheat, a special verdict was found at *Guildhall*, which stated,

That 7061 bushels of wheat, the property of the Plaintiffs, on the 23d of *January* 1793, at *Baltimore* in *Maryland*, were shipped by them on board a ship called the *Pomona*, by the order and for the account of *George* and *Henry Browne*, to be paid for by the said *George* and *Henry Browne* at a future day. That the Defendant *Heyward* on the same day and year at *Baltimore*, being then the master of the said ship, signed five bills of lading, whereby he acknowledged the said 7061 bushels of wheat to have been shipped on board the said ship, and undertook to deliver the same at the port of *Cork*, or a market to the said *George* and *Henry Browne*, or their assigns. That one of the said bills of lading, afterwards and before the arrival of the said ship and cargo at *Waterford* hereafter mentioned, was transmitted by the said Plaintiffs to the said *George* and *Henry Browne*, and the said *George* and *Henry Browne* afterwards on the 7th of *March* 1793, sold the said 7061 bushels of wheat to *Claude Scott*, and thereupon indorsed the said bill, thereby

(*a*) [See the cases cited, *ante*, p. 316. n. (*a*).]

ordering

ordering and directing the master of the said ship to deliver the said 7061 bushels of wheat to the said *Claude Scott* or his assigns, and delivered the same bill of lading so indorsed to the said *Claude Scott*, together with an invoice of the cargo of the said ship, and at the same time drew four bills of exchange on the said *Claude Scott* payable three months after date, for several sums of money, mentioned in the said bills of exchange, the amount of, and as and for the price of the said wheat, which said bills of exchange the said *Claude Scott* accepted and duly paid. That the said *Claude Scott* afterwards, and before the arrival of the said ship and cargo at *Falmouth* after-mentioned, indorsed and delivered the same bill of lading to the two other Defendants the *Foxes*, thereby ordering and directing the master of the said ship to deliver the said 7061 bushels of wheat to those Defendants, with an intent that they, as the agents of the said *Claude Scott*, should and might on his account receive and take possession of the said 7061 bushels of wheat. That the said ship with the said wheat on board, soon after the making the said bill of lading, sailed from *Baltimore*, and on the 5th of *March* 1793, arrived at the port of *Waterford* in *Ireland*, the course of the ship towards *Cork* having been changed on account of her having been chased by a *French* privateer; and that the said ship with the said wheat on board afterward proceeded from *Waterford* to *Falmouth*, by the orders of the said *George* and *Henry Browne*, given by them to the said Defendant *Heyward* in that behalf, at the request of the said *Claude Scott*, and arrived at *Falmouth* on the 3d of *April* 1793. That on the 4th of *April* in the same year, at *Falmouth* the Defendant *Heyward* reported the said ship at the Custom-house there, and made oath that the said wheat was for the said other Defendants the *Foxes*, and the *Foxes* on the 5th of *April* in the same year, made entry of the said wheat at the Custom-house at *Falmouth* in their names as agents of the said *Claude Scott*. That 800 bushels of the said wheat were taken out of the said ship, by the Defendants the *Foxes*, and received and taken into their possession as such agents of the said *Claude Scott*, and for his account, between the 3d and 8th of *April*. That the said *George* and *Henry Browne* on the 5th of *April* 1793 became bankrupts, and that they had not at that time, nor at any time since paid the Plaintiffs for the said wheat, and that the said Plaintiffs on the 8th of *April* 1793, gave

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1795. gave notice to the Defendant *Heyward* not to deliver the residue of the said wheat to the other Defendants the *Foxes*, and requested the said *Heyward* to deliver the residue of the said wheat to them the Plaintiffs, and offered to pay him the freight and all other charges due on account of the said cargo, but the said *Heyward* would not deliver the said residue of the said wheat to the said Plaintiffs, and afterwards, and before the commencement of this action, delivered the same to the said other Defendants, who had converted and disposed thereof to the use of the said *Claude Scott*. But whether, &c.

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On behalf of the Plaintiffs, *Le Blanc*, Serjt., argued in the following manner. The only question appears to be, whether there be any thing in the finding of the jury, which distinguishes this case from that of *Lickbarrow v. Mason* (a). That case having been so recently and so fully discussed, it is not now necessary to agitate the question how far a bill of lading is a negotiable instrument; it is sufficient for the Plaintiffs that they appear upon the face of the special verdict entitled to maintain the action. The contract was between the shippers of the goods and the master of the vessel. Suppose the shippers had, before the sailing of the ship, required the master to unload, and give back the cargo to them, could the master have refused, and given at his election a right to another person to receive it? If he could not, neither could he legally deliver the wheat in the present instance to the *Foxes*, after having had notice from the shippers not to deliver it; he was therefore a wrong-doer, and guilty of a conversion. The cargo is found to have been the property of the Plaintiffs, to be paid for at a future day by the consignees or their assigns, and before the delivery, (for it cannot be contended that a delivery of part of a divisible cargo was a delivery of the whole,) the consignees became bankrupts. The case therefore, at least as far as it relates to the residue of the goods undelivered, comes immediately within the authority of *Lickbarrow v. Mason*, which as it was decided in the Exchequer Chamber, affirms the right of stopping goods *in transitu*; and that decision was not overset in the House of Lords, where the case went off upon a *venire de novo*, leaving the material points undetermined. The only difference between the cases is this, that in *Lickbarrow v. Mason* the action was brought by the in-

(a) 2 Term Rep. B. R. 63. *ante*, vol. 1. 357, 6 Term Rep. B. R. 131.

dorsees of the bill of lading against the assignees of the consignees, but in the present case by the owners against the indorsees.

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Marshall, Serjt., *contra*, stated four questions which he meant to argue. 1. What right passes by the indorsement of a bill of lading? 2. Whether the consignor, after the indorsement of the bill of lading for a valuable consideration, may stop the goods *in transitu*? 3. What shall be deemed an end of the *transitus*? 4. Whether, when part of the goods have been delivered to the indorsee of the bill of lading, the master of the ship is justified in delivering the residue, after notice from the consignor not to deliver it? But the Court desired him to confine himself to the two last questions, the case of *Lickbarrow v. Mason* having, in the different stages of it, exhausted all argument on the two first. *Marshall* accordingly began by laying down this proposition, *viz.* that the *transitus* was at an end before the notice was given by the Plaintiffs to the master of the ship not to deliver the goods to the agents of *Scott*. There must be some period of time when the *transitus* is ended, and that period is when the goods are absolutely or constructively come to the possession of the consignee. Here it is stated that the ship arrived at *Falmouth* on the 3d of *April* 1793, that on the 4th the master reported her at the Custom-house, and there made oath that the wheat was for *George* and *Robert Fox*; that on the 5th he entered it in their names as agents of *Scott*, and that between the 3d and the 8th of that month 800 bushels were taken out of the ship, and received into their possession. Now before any part of the cargo could have been carried out of the ship, the whole must have been delivered on board to the agents of *Scott*; when bulk is once broken, and any part delivered, it is a delivery of the whole to the consignee, who thereby acquires a constructive possession of the whole. Suppose after this any part of the wheat had been stolen from the ship, the indictment must have laid it as the property of *Scott*. Suppose any damage done to it, or any part of it taken away, who must have brought the action? The master could not, for he had sworn it to be the property of *Scott's* agents; the consignors could not, for the master their agent had pronounced it to be the property of others. Suppose the duties unpaid, to whom would govern-

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ment have resorted? Surely to the persons whom the master had declared on oath to be the owners. In *Blakey v. Dimsdale*, *Cowp.* 661. the Court held, that if goods are bought by sample to be delivered at a future day, and earnest paid, a delivery to the vendor's servant to carry to the vendee is a delivery to the vendee, and vests the property in him, and that the unloading part of the goods is an actual, and not merely a constructive delivery.

[508] The last question is, whether the master of the ship was not justified in delivering the 800 bushels to the agents of *Scott*, and whether *Scott* by the possession thus obtained did not acquire a perfect title? Little more is necessary for the decision of this question than to examine the form of the bill of lading, which is an acknowledgment by the master that he has received the goods on board, to be delivered according to the consignment, and concluding that any one being accomplished, the others shall be void. Now when the master has delivered the goods according to the tenor and directions of any one of the bills, he has performed his contract, and the rest of the bills are void. But it is stated in the special verdict, that the Plaintiffs on the 8th of *April* gave notice to the master not to deliver the residue of the wheat to the agents of *Scott*, and requested him to deliver it to them, and tendered the freight and other charges. But such a notice could not authorize the master to depart from his solemn contract to deliver the goods to the consignee or his assigns. Even if another bill of lading had been presented to him, instead of the notice on the 8th of *April*, when part of the cargo had been delivered, he would have had his option which of them he should accomplish. This appears from the evidence of the merchants in *Fearon v. Bowers* (a), who agreed, "that where there are several bills of lading, the captain may deliver the goods to whom he thinks proper;" and from the direction of Lord Chief Justice *Lee*, who told the jury, "that the captain was not concerned to examine who had the best right on the different bills of lading. All he had to do, was to deliver the goods upon one of the bills of lading," and therefore directed them to find for the Defendant. If then the master were justified in delivering the residue of the goods to the agents of *Scott*, after the

(a) *Ante*, vol. 1. p. 364.

notice from the Plaintiffs, *Scott* acquired a legal possession as well as a legal title: and it was admitted at the trial, and it is to be inferred from the special verdict, that he had a right to retain all that was legally delivered to him. Supposing therefore that the goods might have been stopped *in transitu*, the *transitus* was at an end; all the cargo was, if not *actually*, at least *constructively* in the possession of *Scott*, and he having fairly obtained that possession, his title was complete.

Le Blanc, Serjt., in reply. In all the cases that have occurred respecting the right of stopping *in transitu*, the question has arisen after the arrival of the ship in port, the *transitus* therefore cannot be ended by that event, nor indeed by anything short of an actual delivery of the goods. In the case of *Blakey v. Dimsdale*, the question was not as to the right of stopping the goods *in transitu*, but whether trespass could be maintained by the vendee after earnest paid and delivery. That case therefore cannot affect the present. A lien, though it originated in equity, is now considered as a legal right, and consequently a court of law will entertain a suit to enforce it. And that right could not be taken away by an entry at the Custom-house in the name of the consignee. [509]

The Court (after some conversation upon the case of *Lickbarrow v. Mason*, which not being material to the point in question, it is not necessary to repeat,) were of opinion that under the circumstances of this particular case the action could not be maintained, for the *transitus* was ended by the delivery of the 800 bushels of wheat, which must be taken to be a delivery of the whole, there appearing no intention, either previous to or at the time of the delivery, to separate part of the cargo from the rest.

Judgment for the Defendants.

1795.

Monday,
May 18th.SAUNDERSON and Others *against* JUDGE.

A. makes a promissory note payable to *B.* or order, with a memorandum upon it that it will be paid at the house of *C.* who is *A.*'s banker; in the course of business the note is indorsed to *C.* In an action by *C.* against the indorser, it is not necessary to prove an actual demand on *A.* (a).

If a note be made payable at a particular house, a demand of payment at that house is as a demand on the maker (b).

The putting a letter into the post-office to the indorser in proper time, informing him that the maker has not paid a note when due, is sufficient evidence of notice to the indorser (c).

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THIS was an action on a promissory note, made by *Sharp*, to *Wilkinson* or order, who indorsed it to *Judge*, he to *Sanders* and Co., and *Sanders* and Co. to *Saunderson* and Co. bankers in *Southwark*, to cover acceptances which they had given on account of *Sanders* and Co. At the foot of the note there was a memorandum by *Sharp*, that he would pay it at the house of *Saunderson* and Co. with whom he had a cash account. Some time before the note became due, *Sharp* had absconded, and on the day when it was due, *Saunderson* and Co. wrote by the post to *Judge*, giving him notice of the non-payment, and demanding payment of him, but there was no other evidence of the notice, than the putting the letter into the post-office. They had made no previous * demand on *Sharp*, not knowing where to find him, having directed several letters to him at his usual place of abode, which were returned with the post-mark upon them denoting that no such person was to be found, and believing him to be insolvent, as he had kept an account with them, but had then no effects in their hands. The declaration was in the usual form by the indorsee against the indorser of a promissory note, without stating that it was to be paid at the house of *Saunderson* and Co. At the trial, the Plaintiffs were nonsuited on the ground that it was incumbent on them to prove an actual demand on the maker of the note. There was also a doubt raised as to the consideration, but nothing turned upon it.

A rule having been granted to shew cause why there should not be a new trial, *Le Blanc*, Serjt., shewed cause, contending that the nonsuit was proper; first, because the note was not presented to *Sharp* for payment by the Plaintiffs, and therefore the averment in the declaration that it was so presented, was not proved; and secondly, because it was not proved that the Defendant received the letter which was put into the post-office, advising him of the non-payment by *Sharp*.

Bond, Serjt., in favour of the rule, said that as by the terms

(a) [See the comments upon this case in *Rowe v. Young*, 2 B. & B. 175.]

(b) [See *Pearse v. Pemberthy*, 3 Campb. N. P. C. 261.]

(c) [Accord. *Kufh v. Weston*, 3

Esp. N. P. C. 54. But the direction of the letter must be sufficiently particular. *Walter v. Haynes*, 1 R. & M. N. P. C. 149. *Mann v. Moors*, 1 R. & M. 249.]

of the note the money was to be paid at the house of *Saunderson* and Co. it was there that it was to be presented for payment. If *Judge*, instead of indorsing the note to *Saunderson* and Co., had there demanded payment of it himself, it would have been sufficient; but as it was indorsed to *Saunderson* and Co. they could not make a demand upon themselves, and *Sharp* was nowhere to be found. As to the proof of the averment in the declaration, that the note was presented to *Sharp* for payment; in all actions on bills of exchange and promissory notes, due diligence used by the holder to obtain payment from the acceptor of the one, and the maker of the other, is evidence to support the averment. With respect to the other objection, the putting the letter to *Judge* into the post-office the day when the note became due, was clearly evidence of notice to him.

Per Curiam. It was no part of the contract in this case, that the note should be paid at the house of *Saunderson* and Co., and therefore that was not necessary to be stated in the declaration (a). But the maker merely appointed the house of his banker, as the place where he was to be called upon for payment, and where it would be paid. Yet this was both an undertaking that there should be cash there, and also an order to the bankers to pay it. It is not necessary that a demand should be personal; it is sufficient if it be made at the house of the maker of the note; and it is the same thing in effect, if it be made at the place where he appoints it to be made. If *Judge* had been the holder of the note, it would have been enough for him to have presented it for payment at the house of *Saunderson* and Co. And as they at whose house it was to be paid were themselves the holders of it, it was a sufficient demand for them to turn to their books, and see the maker's account with them, and a sufficient refusal, to find that he had no effects in their hands. As to the notice to the Defendant, the sending the letter by the post was sufficient evidence of that notice.

Rule absolute.

(a) [But where the particular place of payment is introduced into the body of the note it becomes a part of the contract, *Saunderson v. Bowes*, 14 East, 500. *Dickinson v. Bowes*, 16 East, 110. *Howe v. Bowes*, 11 East, 112. 5 Taunt. 130. S. C. in error.

And so where the memorandum of payment was printed at the bottom of the note, Lord *Ellenborough* held that it formed part of the contract, *Tregothick v. Edwin*, 1 Stark. N. P. C. 468.]

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SON
against
JUDGE.

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1795.

Monday,
May 18th.

In an action against *A.* for seducing the servant of *B.* from his service, it is sufficient evidence that *A.* asked the servant to enlist in the army and afterwards gave him money. An infant slave in the *West Indies* executed an indenture, by which he covenanted to serve *B.* for a certain term of years as his servant, and *B.* covenanted to do certain things on his part: *B.* then came to *England* with the slave. In an action against *A.* who had seduced him from the service of *B.*, *A.* was not permitted to allege that the contract was void, as being made by an infant and a slave, and therefore that

the declaration, which stated him to have been retained as a servant for a term of years, was not proved; for the court held that *the effect of such a contract might be the manumission of the slave*, and consequently that it was for *his own benefit*, and being for his own benefit, that it was, at most, only voidable by the infant himself (*a*).

[*512] (a) [As to the contracts of infants being void or voidable, see *Bayliss v. Dineley*, 3 M. & S. 477. *Gibbs v. Merrill*, 3 Taunt. 313. *Burgess v. Merrill*, 4 Taunt. 469. *Thornton v. Illingworth*, 2 B. & C. 826.]

Plaintiff.

KEANE against BOYCOTT.

THIS was an action on the case, for enticing the Plaintiff's servant to leave his service. The first count of the declaration stated that on the 21st of *April*, 1794, a certain person called *Toney* was retained to serve the Plaintiff for *five years* from that day, and then went on to state the service, and enticement, &c. The second count was, that on the same day and year, &c. a certain person called *Toney* was retained to serve the Plaintiff for a certain term of years which was not yet expired, and that the Defendant well knew the premises, &c. The third was for assaulting the servant and seizing and carrying him away from the service of the Plaintiff &c. *per quod*, &c.

The facts were, that a negro boy called *Toney* a slave in the island of *St. Vincent* about 16 or 17 years old, there executed *an indenture, by which he bound himself to serve the Plaintiff, who was coming to *Europe*, as a servant for five years, and the Plaintiff covenanted to find him food, lodging and clothing, and medical assistance in case of sickness. The plaintiff soon after arrived in this country with the boy as his servant, and went to *Cheltenham*, where the Defendant, who was a captain in the army on a recruiting party, meeting the boy in the street with his livery on, asked him if he would enlist, to which he assented; the Defendant then asked him whether he was an indented servant, to which he answered that he was bound to the Plaintiff for five years. After this the boy went to the Defendant's lodgings, where the Defendant gave him two shillings, and told him to go to *Gloucester* to the regiment; to which place he accordingly went. Upon this, the Plaintiff procured a warrant from a magistrate, under which the boy was taken and brought back to his service; after which, the Defendant sent two serjeants to take the boy again, and bring him back to the regiment, which they did; but it did not appear that the boy went with them unwillingly or by compulsion.

On this evidence, the jury found a general verdict for the

Plaintiff. But a rule was obtained by *Le Blanc*, Serjt., to shew cause why there should not be a new trial, on the ground that the only count to which the evidence was applicable was the last, but as it appeared that the boy was not taken away by the serjeants against his will, or by force, that count was not supported. That with respect to the two other counts there was neither evidence of enticement, nor of the allegation of the boy being retained as a servant for *five years*, as in the first count, or for a certain *term of years then unexpired*, as in the second; for as to the enticement, the merely asking a person to enlist, more especially by a recruiting officer whose duty it was to promote the military service, could not be deemed an enticing, and the money was given to the boy after the enlisting was complete, not as an inducement to enlist: and as to the allegation respecting the term of years, the boy being both an infant and a slave when the indenture was entered into, it was clearly void, and therefore the contract was not binding.

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Adair, Serjt., was now going to shew cause, when it was suggested by *Heath*, J., that as slavery was differently modified in different parts of the *West Indies*, perhaps the effect of the master entering into a contract with his slave might be to enfranchise him, by analogy to the old law respecting villeins in *England*, to whom, if the lord entered into an obligation, it operated as a manumission (*a*); and if the effect were an emancipation from slavery, it was evidently a contract for the benefit of the infant, and if not binding on him, at least only voidable by him, and therefore a third person should not be permitted to say that it was void, in order to protect himself from the consequences of his own tortious act. Upon this being thrown out, it was agreed that the case should stand for farther consideration. And on this day, without more argument, the judgment of the court was thus given by

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Lord Chief Justice EYRE. In this case we were all agreed on the first question, that there was evidence of enticing the servant sufficient to go to the jury. But the question whether the allegation in the declaration, that the servant had contracted to serve the master for a term of years then to come and unexpired, was proved, was more difficult. The servant had in fact executed indentures, by which he contracted to

(a) Co. Litt. 137 b. 138. 11 State Trials, 342. *Hargrave's* argument in the case of *Somerset* the negro.

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serve the master for five years. But he was both an infant and a slave of his master at the time when he entered into the contract: he was very young and entirely in the power of the master. From these circumstances doubts arose whether the contract would bind him, and if it would not bind him, whether it would avail anything as against the Defendant. My Brother *Heath* brought this question into the right train, by suggesting that the effect of this contract, by analogy to the law between lord and villein, might be to emancipate the slave (*a*), and therefore that it was for the benefit of the infant, which might remove the objection of infancy and slavery. This leads to the consideration of what contracts may be entered into by infants, whether they can contract by deed, whether their contracts are void or only voidable, and if only voidable, who shall take advantage of the infancy to avoid them. In *Litt. sect. 259*, it is said, "If before such age (*i. e.* 21.) any deed or feoffment,

(*a*) With the greatest deference to the high authority which started, as well as to that which pursued this ingenious conjecture, it is to be observed that it is inconsistent both with the general policy, and local institutions of the *British Islands* in the *West Indies*, to suppose that a slave can be *manumitted* by implication. The histories of those islands and their statute books shew that *manumission* can only be effected by some act of the master, done *expressly* for that purpose, and accompanied with the *settlement of an annual provision* on the slave so manumitted. On this subject the law of the island of *St. Vincent* is particularly strict. In the edition of the statutes of that island published in 1788, page 46, the 24th clause of the act entitled "An Act for making slaves real estate, and the better government of slaves and negroes" directs "That no person or persons whatsoever shall hereafter *manumit* or set free any slave or slaves, except he, she, or they, or the representatives of such person or persons, *previous to such manumission*, pay into the public treasury of this island *one hundred pounds* current money, for the use of the said island; and the receipt of the treasurer for the time being shall be *tacked to the deed of manumission*, and be an autho-

riety for the same; and the treasurer for the time being is hereby authorized and directed to pay half yearly to any slave so manumitted, out of the public treasury, four pounds current money for the maintenance of such slave, during the natural life of such slave, and the receipt of such slave, or a certificate from a justice of the peace of the payment of such money in his presence, (which every justice is hereby required to give when thereto required or applied to for the purpose) shall be a discharge to the said treasurer for all such money as he shall from time to time pay to such slave or slaves; and any *manumission made in any other manner than aforesaid shall be void.*" This being so, the foundation of the argument, namely that the effect of the master entering into a contract with the slave might be to enfranchise him in the island of *St. Vincent* where it was made, evidently fails. The question, whether such would be the effect of the contract *in this country*, could not arise, because as soon as a slave arrives here, the yoke of slavery is dissolved by operation of law, whether he has previously entered into any contract or not, and whatever may be his situation with respect to the service of his master.

grant,

grant, release, confirmation, obligation, or other writing be made by any of them &c., or if any within such age be bailiff or receiver to any, &c., all *serves for nothing, and may be avoided.*" But this is certainly not correct, and Lord Coke's observation on it is, "Here by this, &c. are implied some exceptions out of this generality; as an infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessities, and likewise for his good teaching or instruction, *whereby he may profit himself afterwards*; but if he bind himself in an obligation, or other writing *with a penalty* for the payment of any of these, that obligation shall not bind him." And in *Cro. Eliz.* 920, it was holden, that an obligation from an infant for his necessary meat and drink, in the very sum disbursed on that account, was good, but not in double the sum. The conclusion is, that for those things which the Court can pronounce to be necessary for the infant, he may bind himself even by deed. If this question were between the master and the servant himself, the Court would hardly hesitate to say, that a contract to serve for five years having the effect of emancipation from slavery, was a contract for necessities, in the enlarged sense of the word, as extending to all the cases enumerated in *Co. Lit.* But it is not necessary to go the whole length of that proposition, as this is not a case between the master and the servant.

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We have seen that some contracts of infants, even by deed, shall bind them. Some are merely void, namely, such as the court *can pronounce to be to their prejudice*. Others, and the most numerous class, of a more uncertain nature as to benefit or prejudice, are voidable only, and it is in the election of the infant to affirm them or not. In *Rol. Abr.* tit. *Enfants* (a), and *Com. Dig.* (b) under the same title, instances are put of the three different kinds of good, void, and voidable contracts. Where the contract is by deed, and not apparently to the prejudice of the infant, *Comyns* states it as a rule, that the infant cannot plead *non est factum*, but must plead his infancy: it is his deed, but this is a mode of disaffirming it. He indeed states the rule generally, but I limit it to *that case*, in order to reconcile the doctrine of void and voidable contracts. Upon the distinction between those two species of contracts, we cer-

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(a) 1 *Rol. Abr.* 728.(b) 3 *Com. Dig.* 619, 8vo. See also 3 *Burr.* 1794. *Zouch v. Parsons.*

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tainly are not warranted to decide, that a contract which may have the effect of emancipation, and which certainly puts the infant in no worse condition than he was in before, is so prejudicial to him as to be merely void. If it be a contract voidable only, the infant may affirm it: and that is sufficient to decide this case. For this is the case of a stranger and a wrong-doer interfering between the master and servant, and now seeking to take advantage of the infant's privilege of avoiding his contracts, a privilege which is personal to the infant, and which no one can exercise for him. Suppose the case of a stranger disseising the feoffee of an infant, the entry tolled, and a writ of right brought by the feoffee, should the tenant be permitted to object the infancy of the feoffor? In *Whittingham's* case, 8 Co. 42 b. it was holden, that a privity in law, not in blood or estate, did not entitle a third person to avoid the act of an infant. That was the case of an escheat, and several other cases are put in our books, where if the infant himself does not take advantage of infancy, no one else shall, and which are cases where the party who would take advantage of the infancy has a direct interest in the subject to which the act done by the infant has relation.

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The Defendant in this case had no concern in the relation between the Plaintiff and his servant; he dissolved it officiously, and to speak of his conduct in the mildest terms, he was carried too far by his zeal for the recruiting service. If he had given himself time to reflect upon what his own feelings would have been, if he had been in the situation of the master, I am persuaded that he not only would not have solicited this negro boy to leave his master, but would not have accepted him if he had voluntarily offered to enlist at the drum head. Upon the whole, therefore, we are of opinion that the verdict is right, and that there ought not to be a new trial.

Rule discharged.

GOODTITLE

1795.

Friday,
May 16th.

GOODTITLE, on the several demises of HOLFORD, JERVOISE and CAVE, Bart. *against* OTWAY.

THIS ejectment which was brought under the direction of the Court of Chancery, and was on this day tried at bar, arose from the following circumstances, which were stated by *Le Blanc*, Serjt., who led for the Plaintiff, in his opening to the Jury.

The late Sir *Thomas Cave*, Bart. was seised in fee of the manors and estates of *Swinford* and *South Kilworth* in the county of *Leicester*, subject to a mortgage for 14,500*l.* He was also seised in tail of the manor and estates of *Stanford*, &c. in the same county, subject to two mortgages for 6000*l.* and 5000*l.* and an annuity of 1400*l.* to his mother Lady *Cave*, for life. Upon the 13th of *December* 1790, the following paper was signed by the Earl of *Harborough* and him, “ Heads of an agreement entered
“ into between the Right Honourable the Earl of *Harborough*
“ and Sir *Thomas Cave*, Bart. respecting the intended marriage
“ between the said Sir *Thomas Cave* and Lady *Lucy Sherrard*,
“ daughter of the said Earl of *Harborough*.” “ The said Earl
“ of *Harborough* agrees that he will make such addition to Lady
“ *Lucy Sherrard*’s present fortune as will make her marriage
“ portion amount to 30,000*l.* and that the same shall be paid
“ and secured as under-mentioned, *viz.* that he will pay down
“ upon the marriage the sum of 20,000*l.* and will secure upon
“ some adequate part of his real estate the remaining 10,000*l.*
“ to be paid upon the decease of him the said Earl of *Harbo-*
“ *rough*.” “ Sir *Thomas Cave* agrees on his part to apply a
“ sufficient part of the fortune which he receives upon the mar-
“ riage in discharging the mortgage debt of 14,500*l.* which is
“ owing to Sir *Francis Drake*, Bart. upon his estates at *South*
“ *Kilworth* and *Swinford*, and to settle the said estates so as to
“ secure to Lady *Lucy Sherrard* a jointure thereout of 1400*l.* *per*
“ *annum* for her life, to commence from Sir *T. Cave*’s decease,

A. by his will devised lands to *B.*, and afterwards, upon his marriage conveyed them by lease and release to trustees to other uses, with the usual limitations in marriage-settlements. *Parol evidence* was not admissible to shew that *A.* meant his will to remain in force, unrevoked by the subsequent conveyance (*a*).,

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(*a*) [This case came a second time before the consideration of the Court, on the question, whether the will was revoked (or rather annulled) by the deeds of lease and release, when it was held that it was revoked. For the opinions of the Judges, see 3 Ves. 650. 682. 1 Bos. & Pul. 576. This

judgment was afterwards affirmed on error in K. B. 7 T. R. 399. For the decree in Chancery, which was afterwards affirmed in the House of Lords, see 2 Ves. jun. 604. n. 3 Ves. 682. and 7 Br. Parl. Cas. title, Wills. See also Mr. Serjt. *Williams*’s note, 1 Saund. 277 a. *Parker v. Biscoe*, 3 B. Moore, 24.]

“ clear

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 GOODTITLE
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“ clear of all deductions, and also to secure to Lady *Lucy* out
 “ of his *Stanford* estate an additional jointure of 600*l.* *per an-*
 “ *num*, to commence from the death of the survivor of Sir *T.*
 “ and Dame *Sarah Cave* his mother, clear of all deductions;
 “ also to make a provision out of the said estate at *Stanford*, for
 “ securing to the younger children of the marriage the under-
 “ mentioned portions, *viz.* if only one, the sum of 15,000*l.* and
 “ if two or more the sum of 20,000*l.* in equal shares, and in
 “ case Lord *Harborough* pays down more than 19,000*l.* Sir *T.*
 “ *Cave* agrees to apply all the overplus towards discharging the
 “ incumbrance which is owing upon his *Stanford* estate to *Ro-*
 “ *bert Gosling*, Esq., and also agrees that the remainder of the
 “ said 30,000*l.* shall, whenever it is paid, be applied to the like
 “ purpose. Sir *T. Cave* likewise agrees to settle his *Stanford*
 “ estate, subject to the present Lady *Cave's* jointure, and the
 “ reversionary jointure to Lady *Lucy*, and the portions to
 “ younger children as above mentioned, upon his eldest son
 “ and his heirs male in strict settlement.” In *Hilary Term*
 1791, Sir *Thomas* suffered a recovery of the *Stanford* estate to
 the use of himself and his heirs; and by his will dated the 13th
March 1791, in case he should happen to die without leaving
 any issue of his body living at his decease, he devised all his
Stanford estate, and also his *Swinford* and *South Kilworth* estates,
 and all other his real estates, subject nevertheless to such joint-
 ure or jointures as he might thereafter make upon any woman
 he might happen to marry, to trustees for 500 years; and sub-
 ject thereto to his uncle the Reverend *Charles Cave* and his
 issue male in strict settlement, with several remainders over in
 favour of *John Cave Brown* and his family, who were enjoined
 to take the name and arms of *Cave*, remainder to his own right
 heirs; and the trusts of the term were to raise 20,000*l.*, 10,000*l.*
 thereof to be divided among the aunts of the testator, and the
 remaining 10,000*l.* to be placed out in the stocks during the
 life of his sister *Sarah Otway* (the wife of the Defendant), in
 trust to pay the interest and dividends to her for life for her
 sole use; and after her decease to divide the principal equally
 among her children then living; and in case of her death with-
 out leaving children, to pay the same to the persons entitled
 under the will to the real estate. By indentures of lease and
 release of the 25th and 26th of *May* 1791, reciting that Sir *T.*
Cave was seised of the *Stanford* estate in fee, subject to an an-
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nuity or rent-charge of 1400*l.* to Lady *Cave* for life, and to two terms of 200 years and 1000 years for securing the two mortgages for 6000*l.* and 5000*l.* and reciting *the intended marriage*, and that Lady *Lucy Sherrard* was possessed of 4500*l.*, and that Lord *Harborough* had agreed upon the treaty of the said marriage to add thereto on or before the said marriage 14,500*l.* and also to secure the payment of the two several sums of 6000*l.* and 5000*l.* within six months next after his decease, to be applied as thereafter mentioned, so as to make Lady *Lucy's* portion 30,000*l.*, and that upon the said marriage treaty Sir *T. Cave* did agree in consideration of the said portion to charge certain freehold estates in *Swinford* and *South Kilworth* with an annuity of 1400*l.* to Lady *Lucy* for life, to commence after his death, and certain parts of his estates at *Stanford* with a farther annuity of 600*l.* to her for life, to commence after the death of the survivor of Sir *T. Cave* and Lady *Cave* his mother, and that he would settle the *Stanford* estate to the several uses thereafter expressed, Sir *T. Cave* in consideration of the intended marriage, and 4500*l.* paid by Lady *Lucy Sherrard*, and of 14,500*l.* paid by Lord *Harborough*, and of 6000*l.* and 5000*l.* covenanted by Lord *Harborough* to be paid within six months after his decease, conveyed the *Stanford* estate to trustees to hold to them and their heirs, to the intent that Lady *Cave* his mother, might receive her annuity of 1400*l.* for life; and subject thereto and to the two terms of 200 years and 1000 years, to the use of Sir *T. Cave* and his heirs till the marriage, and after the marriage to the use of trustees for 99 years, and subject thereto to the use of Sir *T. Cave* for life; remainder to trustees to preserve contingent remainders; remainder as to part to the intent that Lady *Lucy*, in case she should survive Sir *T. Cave* and his mother Lady *Cave*, should receive an annuity for life of 600*l.* *per annum* in bar of dower; and as to the premises charged with the said annuity, to the use of trustees for 500 years; and as to all the other premises to the use of trustees for 1000 years, and subject to those terms, as to all the premises to the use of the first and other sons of Sir *T. Cave* and Lady *Lucy Sherrard* in tail male; remainder to the use of Sir *T. Cave*, his heirs and assigns, for ever. The trust of the term of 99 years was to keep down the interest of the mortgages of 6000*l.* and 5000*l.*, that of the term of 500 years was to secure Lady *Lucy's* annuity of 600*l.*, and that of the term of 1000 years was to

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to raise portions for younger children; if only one, 15,000*l.*, if more, 20,000*l.* equally to be divided between them. There was also a proviso enabling Sir *T. Cave*, in the event of his surviving Lady *Lucy*, to assign, limit and appoint any part of the lands, hereditaments and premises, comprised in the term of 500 years, to any woman or women he should afterwards marry, by way of jointure, so as not to exceed the yearly value of 500*l.* By other indentures of lease and release of the same date, with similar recitals, as far as related to the estates of *Swinford* and *South Kilworth*, Sir *T. Cave* conveyed those estates to trustees, to hold to them and their heirs to the use of himself till the marriage; and afterwards to the intent that Lady *Lucy*, in case she should survive him, should receive an annuity of 1400*l.*, which together with the said other annuity of 600*l.* was to be in bar of dower; and as to all the premises charged with the said annuity of 1400*l.* to the use of trustees for 500 years for better securing the said annuity, and subject thereto to the use of Sir *T. Cave*, his heirs and assigns. The marriage took place on the 2d of *June* 1791. Lord *Harborough* then paid down 20,000*l.* with which the mortgage of 14,500*l.* was satisfied; and he soon afterwards paid a further sum, which was applied towards discharging the *Stanford* estate. On the 15th of *January* 1792, Sir *Thomas Cave* died without issue, leaving his sister *Sarah Otway*, the wife of the Defendant, his heir at law.

Upon these facts *Le Blanc* stated the only question to be, whether the will of Sir *Thomas Cave* was revoked by the deeds composing the marriage-settlement, and that he should produce the clearest evidence to shew that it was the intention of Sir *Thomas* that his will should remain in force, notwithstanding the settlement. For this purpose the attorney who drew the will was called as a witness, who being asked whether he remembered any conversation between him and Sir *Thomas Cave* respecting the making his will, was proceeding in his answer, when he was interrupted by *Adair*, Serjt., who objected to any parol evidence of this kind being received, and together with *Bond*, Serjt., thus argued against its admissibility.

[520] The legal operation of written instruments must be determined by the instruments themselves, and cannot be affected by parol evidence. If such evidence be not adduced to confirm or defeat, vary or explain, the instrument, it is wholly irrelevant, and if it be applied to either of those purposes it is not admissible

sible in law. This as a general proposition is not to be disputed, and with respect to wills it is supported by *Plowd.* 345. 5 *Co.* 68 a. *Cheney's case.* 2 *Vesey*, 217. 2 *Vern.* 98. 1 *Eq. Cas. Abr.* 230. 5 *Term Rep. B. R.* 49. *Lancashire v. Lancashire.* The question in the present case is not whether it was the intention of Sir *Thomas Cave* to establish his will, but whether he has not actually revoked it by executing the settlement, and if he has so done, no evidence of his intention can be admitted to contradict the effect of his own deed, whether the evidence offered relates to a conversation prior or subsequent to the making the will. The revocation, if it took place, was caused by an alteration in the legal estate of the devisor, it being an ancient and established rule of law, that if there has been a change in the legal estate of the testator, subsequent to the making the will, though he should have in him as large and beneficial an interest as he had before, yet the will can have no operation, but the heir at law shall succeed, 44 *Ed.* 3. 33. 1 *Roll. Abr.* 616. 8 *Vin. Abr.* 137. It is also the same with respect to those conveyances which do not operate by transmutation of possession, as those which do. 1 *Eq. Cas. Abr.* 112. *Pollen v. Huband.* Nor could any declarations of the testator, either before or after he made the will, have any effect upon it so as, by being coupled with the execution of the settlement, to amount to a republication. 1 *Vesey*, 440. *Martin v. Savage.*

Le Blanc and *Williams*, Serjts., *contra*. All the cases cited of revocations arose from a supposed intention of the testator that the will should be revoked. The mere execution of a deed of conveyance of lands subsequent to the making a will of them, does not of itself produce a revocation. Thus if one tenant in common devises his part, and afterwards by indenture and fine partition is made between him and his companion, this is no revocation, 8 *Vin. Abr.* 144 (*R.* 6.). The foundation then of the Defendant's claim being a constructive revocation of the will in question, arising from a presumed intention of the testator that it should be revoked, the Plaintiff ought to be at liberty to give evidence to rebut that presumption. And in truth such evidence was received in *Brady v. Cubitt*, *Dougl.* 31. 8vo. In *Lancashire v. Lancashire* the point in question was, whether marriage and the birth of a posthumous child amounted to a revocation of the will, not whether evidence should be admitted.

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Adair in reply. There are two kinds of revocations, the one
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caused by extrinsic circumstances, the other by the legal act of the party himself. Of the first kind was the revocation contended for in *Brady v. Cubitt*, to rebut the presumption of which parol evidence was admitted, and not without reason, for as the marriage and birth of the child must have been proved by that species of evidence, so the conclusion to be drawn from those circumstances, might be repelled in the same manner. But where the party has himself done a solemn act, from which a revocation follows as a legal consequence by operation of law, no intention of his *dehors* the deed can prevent that consequence. Lord *Lincoln's case*, 8 *Vin. Abr.* 145. 3 *Atk.* 741. *Parsons v. Freeman*, 3 *Atk.* 798. *Sparrow v. Hardcastle*.

Lord Ch. J. EYRE. It was necessary that the question should be put upon its true ground, for it was mere beating the air to argue it upon grounds that did not at all apply to it. There being no doubt in the case about the execution of the will, there could not possibly be any use in debating whether parol evidence should be examined to determine the import of a will, which import was not in dispute. But it was very apparent from the opening, that the true meaning of the examination was to establish that Sir *Thomas Cave* in all the acts that he did, intended to preserve his will, and not to revoke it; and it was hoped that this evidence might be admitted, in order to repel any presumption that might arise from the execution of those deeds, of an intention to revoke it.

[522] There were before the passing of the Statute of Frauds, and there are since, two species of revocations of wills; the one by operation of law, the other by matter *in pais*, the one to be pronounced upon by the Court, the other, as I take it, to be examined into before a jury. Since that statute, the distinction remains the same, the difference only is that a great number of cases upon which revocations were pronounced by courts and juries, upon the ground of an intention to revoke, are done away, and the cases in which there shall be a revocation *in pais* are fixed and reduced to a small number. All those cases, strictly speaking, proceed upon the ground of an intent in the testator to revoke; but I take it there is this difference between the cases of revocation by operation of law and those by matter *in pais*, that in those of the former kind the law pronounces upon the ground of a *presumptio juris et de jure*, that the party did intend to revoke, and that *presumptio juris* is so violent that it does not admit

mit of circumstances to be set up in evidence to repel it. And this makes it difficult to understand the case in *Douglas* (a), supposing that to be a case of revocation by operation of law, and not within the statute of frauds. With regard to the cases which come under that statute of revocation by matter *in pais*, the court must always have heard evidence on both sides, and from the result of that evidence the question whether the presumption of fact was to be made or not, must have been for the court and jury to decide. And if this were a case of that sort, we should certainly hear evidence from whence an intention could be collected. But this is not a case within the statute of frauds, but arises on an implied revocation by operation of law, of which the law can only judge, and which must be collected from the circumstances that give birth to the presumption; and the only question is whether they are violent enough to raise that presumption. But there is a third case which I think has been improperly called in all the books a case of revocation. By a very strict and technical exposition of the statute of wills it was holden, that a will could only operate upon that estate which the party had at the time when he made his will, and not upon any new estate which he might afterwards acquire. If he sold his estate after he made his will, of course it could not operate, because the estate was gone; but in neither of those cases was the will, properly speaking, revoked; it remained good, but it lost the object upon which it was to operate. With regard to an estate absolutely disposed of, the rule was clearly just and necessary, but with regard to one newly acquired it was certainly most unreasonably strict; for considering the nature of a will which is ambulatory, and not to take effect till the death of the party, the operation of it should be applied to the circumstances of the testator at the time of his death. But it was doubly strict, and bordering upon something which I hardly know how to express, when they held that if the party changed the form of his title, having the estate in him when he made his will, if he afterwards made some conveyance by which the beneficial interest in the estate was to remain in him precisely as it was before, that it was a new estate, upon which the will could not operate. To call that a revocation appears to me an absurdity. However so it was, and it was carried to that monstrous extent, that though the

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new conveyance was made for the purpose of confirming the will, yet the court said it was a new estate, and the will could not operate upon it, and therefore the heir at law was let in. This most apparently was a determination which excludes all question of intent, because there could be no doubt at all in the strong case I last put, that all considerations of intent must be laid aside; for if intent could have done any thing for the devisee, an instrument purporting to be made to confirm the will manifested an intent that could not be resisted. Yet this objection to the operation of the will is entirely beyond the intent: the only estate upon which the will could operate was gone from him; he had taken a new estate.

That being so, let us see whether this is a case in which any question of intent can be made. I take it to be manifest from the opening that it is intended to be insisted on by the Plaintiffs, that by the necessary operation of the conveyances used Sir *Thomas Cave* lost his old estate upon which the will operated, and took a new one. If so, the consequence is, that though there be the clearest demonstration that it was his intent that the will should operate upon it, the law says it shall not, and by that law we are bound. If this be a case of that kind, it is a case that will disappoint the will, even admitting the clearest intention that it should not. All evidence therefore of intent seems to me entirely foreign to the question; all such evidence therefore must be rejected, and the question tried upon its true legal grounds.

[His Lordship afterwards said he had most cautiously avoided the committing himself upon the question, whether
 [524] the deeds did really produce that alteration in the estate, and that he desired to be so understood.]

BULLER, J. We are to consider, in order to determine whether this evidence be or be not admissible, to what it is to be applied. If the question was whether the testator was incapacitated, or the instructions given were duly followed, the evidence would be admissible. But here the end proposed by it is to shew that the deeds shall have a different construction from that which the words import, which cannot be done. There is a great difference between cases which depend on circumstances, and those which depend on the solemn acts done by the party himself, and that distinction supports the case of *Brady v. Cubitt*. There was no act in that case done by the
 testator

testator importing that he meant to revoke his will, or change it in any respect: but changes having happened in his family by marriage and the birth of a child, there was a presumption of revocation, and therefore it was to answer that presumption that the court received parol evidence. But I cannot find from any one case quoted at the bar, that the court has received parol evidence in the case of a deed executed by the party himself, with a view of altering the construction of the instrument. I think the cases on the other side prove that it cannot be done. The case of *Parsons v. Freeman* (a) cited by my Brother *Adair* goes directly to that point, and perhaps is the strongest case that can be put, because it there appears that the intention of the testator was to confirm his will, and not revoke it. It is perfectly clear that a doctrine did at one time prevail in *Westminster Hall*, that the court might receive evidence, which they thought according to the strict rules of law ought not to be offered to a jury. But evidence which is not to be received as between the parties, to give a construction to a written instrument that is brought in dispute, seems to me to be no more admissible by a court than by a jury. The case cited from 2 *Vern.* 98. appears to go upon all fours with this, and there the court refused to admit such evidence. Upon this ground it seems to me that the only case that admits of any doubt is that of the partition mentioned by my Brother *Le Blanc*. The case of a partition and a charge upon a mortgage are both cases which principally happen in courts of equity. But I take it to have been fully established in courts of law, previous to that determination, that a partition was not a revocation of a will. By the partition the party takes no new estate, having precisely the same interest that he had before. When the question comes on in a court of equity, that is the circumstance upon which the Court is to pronounce. There is a partition to be carried into effect by deed, and if the partition itself is not a revocation, the mode in which it is made shall not be so. That case therefore stands upon grounds peculiar to itself, and there is no other which at all contradicts the doctrine laid down in the other cases which have been cited, that in solemn acts done by the party, the deeds must speak for themselves, and cannot be explained by parol evidence; and upon that ground I perfectly concur with my Lord, that this

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(a) 3 Atk. 741.

1795. evidence ought not to be received. In Lord *Lincoln's* case (a), the estate was limited to Lord *Lincoln* in fee till the marriage, and there was no marriage, and the estate was never out of him, yet the execution of the deeds of lease and release was holden to be a revocation. I therefore concur in opinion with my Lord, that this is a *presumptio juris et de jure*, and that the case must stand or fall by the rule of law, without being explained by parol evidence.

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HEATH, J. Here are two instruments, the first of which in point of time is the will. Now a will may be construed according to the intention of the party, not always observing the strict rules of law; but a deed must take effect according to its legal operation, and it is impossible to admit evidence to explain it. The question is here, whether evidence can be admitted to counteract the effect of the deed, and I think most clearly that it cannot. Then another question arises upon the statutes of uses and of wills (b), whether the alteration of the legal estate be sufficient to revoke a will. One cause of the making the statute of uses was that great confusion had been occasioned in families, and a disturbance of the solemn dispositions made by men in respect of their estates, by their lands being first put in use, and then devised. That statute therefore annexed the possession to the use, and wills could no longer be made. But when by the statute of wills men were once again enabled to dispose of their lands by will, it was ruled that the statute operated upon the legal estate, and therefore when the legal estate was changed, it shewed an intention in the testator to change the estate upon which the will was to operate. And it is impossible now to shake this doctrine. How often has it happened that deeds, wrong upon principles of conveyancing, have been holden to work a revocation! That, it seems to me, must be the course of the Court, and that this evidence ought not to be admitted.

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ROOKE, J. If this were a question upon the real intention of the testator, I do not think that any evidence could make it clearer than at present it appears, that he did not intend to revoke his will. But the question is whether Sir *Thomas Cave* by these deeds did or did not revoke it? Which being a question of mere law, I think we ought not to receive any evidence, because it cannot possibly affect the question.

(a) Show. Cas. in Parl. 154. 8 Vin. Abr. 145.

(b) 27 Hen.8. c. 10. 32 Hen. 8. c. 1. 34 and 35 Hen. 8. c. 5.

The evidence was accordingly rejected, and by consent a special verdict found, stating the facts which are above set forth. The case on the spécial verdict was argued in *Trinity* term 35 *Geo.* 3, and at the end of *Hilary* term 36 *Geo.* 3. remained for a second argument (*a*).

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(*a*) See *Brydges* v. The Duchess of Chandos, 2 Vezey, junior, 417, the decree in which case was affirmed in the House of Lords, Nov. 23d, 1795, and which will probably be consider-

ed as going a great way towards the decision of the present case of *Goodtitle* v. *Otway*. But see also *Williams*, v. *Owens*, *ibid.* 595.

END OF EASTER TERM.

CASES

C A S E S

ARGUED AND DETERMINED

1795.

IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER CHAMBER,

IN

Trinity Term,

In the Thirty-fifth Year of the Reign of GEORGE III.

DOVASTON *against* PAYNE.

Wednesday,
Jan. 10th.

REPLEVIN for taking the cattle of the Plaintiff. Avowry, that the Defendant was seised in fee of the *locus in quo*, and took the cattle damage-feasant. Plea, that the *locus in quo* “ lay contiguous and next adjoining to a certain common “ and public king’s highway, and that the Defendant and all “ other owners, tenants and occupiers of the said place in which “ &c. with the appurtenances, for the time being, from time “ whereof the memory of man is not to the contrary, have repaired and amended, and have been used and accustomed “ to repair and amend, and of right ought to have repaired “ and amended, and the said Defendant still of right ought to “ repair and amend the hedges and fences between the said “ place * in which, &c. and the said highway, when and so often “ as need or occasion hath been or required, or shall or may “ be required to prevent cattle *being in the said highway* from “ erring and escaping thereout into the said place in which, “ &c. through the defects and defaults of the said hedges and “ fences, and doing damage there. And because the said

A plea in bar of an avowry for taking cattle damage-feasant, that the cattle escaped from a public highway into the *locus in quo*, through the defect of fences, must shew that they were *passing on the highway* when they escaped; it is not sufficient to state that *being in the highway* they escaped (a).

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(a) [Vide 2 Saund. 206 a. 284 c. (notes) 5th Edit.]

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“ hedges and fences between the said place in which, &c. and
 “ the said highway, before and at the time when, &c. were
 “ ruinous, broken down, prostrated and in great decay for want
 “ of needful and necessary repairing and amending thereof, the
 “ said cattle in the said declaration mentioned just before the
 “ said time when, &c. *being in the said highway* erred and es-
 “ caped thereout, into the said place in which, &c. through
 “ the defects and defaults, &c.” To this plea there was a
 special demurrer, “ For that it is not shewn in or by the said
 “ plea, that the said cattle before the said time when, &c.
 “ when they escaped out of the said highway into the said
 “ place in which, &c., *were passing through and along the said*
 “ *highway*, nor that they had any right to be there at all, &c.”

In support of the demurrer *Williams*, Serjt., argued as follows. It is a rule in pleading, that if the Defendant admits the fact complained of he must shew some good reason for or justification of it. If the cattle in this case had escaped from an adjoining close through the default of the Plaintiff's fences, the Defendant must have shewn that he had an interest in that close, or a licence from the owner to put his cattle there, *Dyer* 365 a. Sir *F. Leke's* case, recognized *Hob.* 104. *Digby v. Fitzherbert*, for a man is bound to repair against those who have right, but not against those who have no right. So if cattle escape from a highway, the party justifying a trespass must shew they were lawfully using the highway, that is, were passing and repassing on it, which is material and traversable. It is not sufficient that they were simply in it, the *being* there is equivocal and not traversable. The owner of the soil may have trespass, if the cattle do any thing but merely pass and repass, *Bro. Abr. Tresp. pl.* 321. And according to this principle the entries state in pleas of this kind, that the cattle were *super viam prædictam transeuntes*, *Thomps. Entr.* 296. 397. and in *Herne's Plead.* 822, that they were “ *driven along the highway.*”

[529] *Heywood*, Serjt., *contra*. The same strictness is not required in a plea in bar to an avowry in replevin, as in a justification in trespass. Here the Plaintiff pleads the plea, and it is sufficient for him to shew that his cattle were wrongfully taken. The *passing* on the highway is as uncertain as the *being* there, and as little traversable. But the material issues on the record would be whether the fences were out of repair, and whether the

the Defendant was bound to repair them. If he were, it is immaterial whether the cattle were passing on the highway or not. In a plea in bar certainty to a common intent is sufficient. It may therefore be intended that the cattle were lawfully in the highway.

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Lord Chief Justice EYRE. I agree with my Brother *Williams* as to the general law, that the party who would take advantage of fences being out of repair, as an excuse for his cattle escaping from a way into the land of another, must shew that he was lawfully using the easement when the cattle so escaped (*a*). This therefore reduces the case to a single point, namely, whether it does not appear on the plea, to a *common intent*, that the cattle were on the highway using it in such a manner as the owner had a right to do, from the words "*being in the said highway*." This is a different case from cattle escaping from a close, where it is necessary to shew that the owner had a right to put them there, because a highway being for the use of the public, cattle may be in the highway of common right; I doubt therefore whether it requires a more particular statement. It would certainly have been more formal, to have said that the cattle were passing and repassing, and if the evidence had proved that they were grazing on the way, though the issue would have been literally, it would not have been substantially proved. But I doubt whether the being in the highway might not have been traversed, and if the *being* in the highway can be construed to be certain to a common intent, the plea may be supported, notwithstanding there is a special demurrer, for a special demurrer does not reach a mere literal expression. The precedents indeed seem to make it necessary to state that the cattle were passing and repassing, but they are but few; yet upon the whole, I rather think the objection a good one, because those forms of pleading are as cited by my Brother *Williams*.

BULLER, J. This is so plain a case, that it is difficult to make it a ground of argument. But my Brother *Heywood* says, there is a difference between trespass and replevin in the rules of pleading. In some cases there is certainly a material difference in the pleading in the two actions, though in others they are the same. One of the cases in which they differ, is that if trespass be brought for taking cattle which were dis-

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(*a*) [Vide *Anon.* 3 Wils. 126.]

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trained damage-feasant, it is sufficient for the Defendant to say that he was possessed of the close, and the cattle were doing damage: but in replevin the avowant must deduce a title to the close. Wherever there is a difference, it is in favour of trespass, and against replevin: for in trespass an excuse in a plea is sufficient, but in an avowry a title must be shewn. This brings me to the question whether the plea on this record be good to a common intent. Now I think that the doctrine of certainty to a common intent will not support it. Certainty in pleading has been stated by Lord Coke (*a*) to be of three sorts, *viz.* certainty to a common intent, to a certain intent in general, and to a certain intent in every particular. I remember to have heard Mr. Justice Aston treat these distinctions as a jargon of words, without meaning. They have however long been made, and ought not altogether to be departed from. Concerning the two last kinds of certainty, it is not necessary to say any thing at present. But it should be remembered, that the certain intent in every particular applies only to the case of estoppels (*b*). By a *common intent* I understand that when words are used, *which will bear a natural sense*, and also *an artificial one*, or one to be made out by argument or inference, the *natural sense shall prevail*: it is simply a rule of *construction*, and *not of addition*: common intent cannot add to a sentence words which are omitted. There is also another rule in pleading, which is, that if the meaning of words be equivocal, they shall be taken most strongly against the party pleading them. There can be no doubt that the passing and repassing on the highway was traversable, for the question whether the Plaintiff was a trespasser or not, depends on the fact whether he was passing and repassing and using the road as a highway, or whether his cattle were in the road as trespassers; and that which is the gist of the defence must necessarily be traversable. A most material point therefore is omitted, and I think the plea would be bad on a general demurrer. But here there is a special demurrer, and as the words are equivocal they are informal.

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HEATH, J. The law is as my Brother Williams stated, that if cattle of one man escape into the land of another, it is no excuse that the fences were out of repair, if they were trespassers in the place from whence they came. If it be a close,

(*a*) Co. Litt. 303.

(*b*) Co. Litt. *ibid.*

the owner of the cattle must shew an interest or a right to put them there. If it be a way, he must shew that he was lawfully using the way; for the property is in the owner of the soil, subject to an easement for the benefit of the public. On this plea it does not appear whether the cattle were passing and re-passing, or whether they were trespassing on the highway; the words used are entirely equivocal.

ROOKE, J. Of the same opinion.

Judgment for the Defendant.

SAVILE *against* JARDINE.

Monday,
June 22d.

IN this action for words, the declaration contained five counts. The first, second and fourth were for words spoken of the Plaintiff in his trade or business as an auctioneer, and were clearly actionable. The third and fifth counts without any *colloquium* of the Plaintiff's trade stated the words to be, "*You are a swindler*", and special damage was laid by reason of the speaking, which said several words in the declaration, &c. Plea general issue. Verdict for the Plaintiff on the whole declaration with one shilling damages.

A rule having been granted to shew cause why the prothonotary should not tax the Plaintiff his full costs, though the damages were under 40s. *Adair*, Serjt., shewed cause, insisting that if the words in any one count were in themselves actionable, and the damages were under 40s., the Plaintiff was entitled to no more costs than damages, according to the stat. 21 *Jac.* 1. c. 16. s. 6., nor would the addition of special damage vary the case, 2 *Black.* 1062. *Collier v. Gaillard*. Besides, to call a man a swindler, is actionable.

Clayton, Serjt., in favour of the rule, argued that to call another a swindler was not actionable. The word swindler has no definite meaning. In common acceptation it only imports *cheating, dishonesty, or fraud. It is indeed libellous if written and published, *P Anson v. Stuart*, 1 *Term. Rep. B. R.* 748. But many words are libellous if written that are not actionable if spoken, such for instance as those which tend to make a man ridiculous, or to cause him to be avoided in society as having

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The simply saying to another "you are a swindler," is not actionable. Where in an action for slander, some of the counts in the declaration are for actionable words, and others for words not actionable, and special damage is laid referring to all the counts, and the Plaintiff has a verdict on the whole declaration; though the damages recovered be less than 40s. he is intitled to full costs (a).

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(a) [See *Turner v. Horton*, Willes, 458. Also 1 *Saund.* 246. 2 *Saund.* 307 a. (notes) 5th edit.]

1795. a noisome disease, 2 *Wils.* 403. *Villers v. Monsley*. To say to a man "you are a swindler" is no more than saying "you are a cheat, or a dishonest person", and those words, not applied to an office or trade, are not actionable. 2 *Salk.* 694. *Tamlin v. Hamlin*, 1 *Show.* 181. S. C. 2 *Saund.* 307. *Todd v. Hastings*, *Stra.* 1169. *Davis v. Miller*. The verdict being general, some damages must be intended to be given on each count, and as the words in the third and fifth counts are not actionable, the damages in respect of those counts were given for the special damage.

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Lord Chief Justice EYRE. If the word *swindler* be not actionable, my Brother *Clayton* has established his point. I think it only equivalent to *cheat*; it cannot be carried farther, and that is not actionable. I cannot well account for the decisions that the calling a man a *thief* is actionable, but the calling him a cheat is not so, unless it be that *thief* always implies felony, but *cheat* not always.

BULLER, J. The word *cheat* has always been holden not to be actionable, and *swindler* means no more; when a man is said to be *swindled*, it means tricked or outwitted.

HEATH, J., and ROOKE, J., of the same opinion.

Rule absolute.

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IN THE HOUSE OF LORDS.

Monday,
June 22d.

HOME against Earl CAMDEN and Others, in Error.

[6 Br. Parl. Ca. 203. S. C.]

Quære,
Whether
the misinter-

THE judgment of the Court of Common Pleas in this case, (*ante*, vol. i. 487.) having been reversed by the Court of pretation of a statute by an inferior court, the consideration of which arises incidentally in the course of a proceeding which is confessed to be within its jurisdiction, be a ground for a *prohibition*? Whether it be not rather a matter of appeal? (a) But clearly in such a case a prohibition will not lie, unless it be made appear to the superior court, that the party applying for the prohibition, has, in the course of the proceedings in the inferior court, alleged the grounds for a contrary interpretation of the statute on which he applies for the prohibition, and that the inferior court has proceeded notwithstanding such allegation. No right is vested by any of the *prize acts* in the captors of an enemy's ship and cargo in war, before the ultimate adjudication of the courts of prize. The issuing a monition therefore to the prize agents by the court of commissioners of appeals in prize causes, to bring in the proceeds of a ship and cargo which have been sold after a sentence of condemnation as lawful prize, but from which sentence there is an appeal, (on a subject distinct from the question whether prize or not, which is not disputed,) is not a ground for a prohibition to that court, for the monition neither interferes with nor defeats any vested rights (b).

(a) [In *Gould v. Gapper*, 5 East, 345. the Court of King's Bench decided, that if a spiritual court misconstrue an Act of Parliament, prohibition lies, *ante*, vol. i. p. 188.]

(b) [See *Willis v. the Commissioners of Appeals in Prize Causes*, 5 East, 22.]

King's

King's Bench, (4 *Term Rep. B. R.* 382.) a writ of error was brought in parliament, and fully argued on grounds in a great measure similar to those taken in the courts below. After which, on the motion of Lord *Thurlow*, the following question was proposed to the judges, *viz.*

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“Whether the declaration is sufficient in law to bar the Defendants from proceeding against *John Pasley*, to compel him to bring in the account of the sales of the ship and cargo, together with the proceeds of such parts thereof as may be in his hands, power, or possession?”

In answer to which, the unanimous opinion of the judges was thus delivered, by

Lord Chief Justice EYRE. The judges have conferred upon the question which your Lordships have been pleased to propose to them, and are unanimously of opinion that the declaration in this cause is *not* sufficient in law to bar the Defendants from proceeding against *John Pasley*, to compel him to bring in the account of the sales of the ship and cargo, together with the proceeds of such parts thereof as may be in his hands, power, or possession. I will open to your Lordships briefly the grounds in law which appear to me to warrant that opinion. A few preliminary observations upon the nature of this proceeding may, in some degree, elucidate the subject. This is an action, in the form of it, to recover damages for proceeding after a writ of prohibition has been obtained, and delivered to the party Defendant. Probably in the early part of our legal history, when the struggle for jurisdiction between the temporal and ecclesiastical courts was violent, and the jealousy of the encroachment of the ecclesiastical jurisdiction upon the temporal was eager, this was a proceeding effective to the whole extent of its form. In modern and in better times this form of proceeding is used for the mere purpose of subjecting the grounds in law, upon which any particular prohibition is sought to be obtained from any temporal court, to a judicial examination in the most solemn manner. How it was moulded to this purpose, will be seen in an instant, if it be considered that in this form of action two things would be necessary to be proved, the first, that the Defendant had proceeded in the court of peculiar jurisdiction after the writ of prohibition had been delivered, the second, that this proceeding was an injury to the Plaintiff. But the Plaintiff would have no ground to complain of the proceeding

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ceeding after a writ of prohibition delivered, as an injury to him, (though it might be a contempt, for which the party might be amenable to the king) unless he could shew that the writ had issued properly, and that he had a just right to claim the benefit of it. This goes at once to all the merits of the prohibition which is supposed to have issued, and makes the legal ground of it the gist of the action.

Such being the nature of this proceeding, it becomes a convenient mode of trying whether a prohibition ought to issue, and it is made practicable by considering all that relates to the contempt, incurred by proceeding after the writ had actually issued, as mere form, and the damages nominal. Accordingly, in modern times, when prohibitions are applied for to the temporal courts, and the parties applying suggest grounds either of fact or law, for obtaining the writ, which appear to the court so doubtful as to be fit to be put in a course of trial, the party applying is directed to declare in prohibition, that is, to institute a feigned action, in the form of that which is now under consideration; in which action, in the shape of a question, whether such a prohibition as is moved for ought to *have been* granted, the real question, namely, whether such a prohibition ought *to be* granted, will be solemnly considered and determined, if the parties think fit, as in the present instance, in the dernier resort, by your Lordships. If any man who hears me should think that he observes something of obliquity in this proceeding, let him look to the effect of it, and he will be satisfied. So long as the temporal courts direct parties to declare in prohibition, a prohibition cannot arbitrarily issue, nor upon any but the most solid and substantial grounds, and the balance in which are to be weighed all the different jurisdictions, in which the public justice of the country is administered to the people, will be holden by your Lordships. In the present case the Plaintiff has declared in prohibition, and the question proposed by your Lordships to the Judges goes to the very foundation of his suit; it is tantamount to a question, whether upon the case stated in this declaration, a prohibition to the effect of the prohibition stated in this declaration, ought now to issue to the Lords Commissioners of Prizes, to restrain them from issuing the process of monition, to compel *John Pasley* to bring in an account of the sale of the ship and cargo mentioned in the proceedings, together with the proceeds of such part thereof,

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thereof, as may be in his hands, power or possession. The ground made by this declaration, for a prohibition to restrain the Prize Court from issuing process to compel the bringing in the account of sales and proceeds of the ship and cargo, is a supposed contravention of the prize acts now in force, particularly the statutes of the 12th and 21st of his present majesty. It is assumed, that if a court of peculiar jurisdiction will proceed contrary to the provision of the statute law of the realm (and that if such a court misinterprets any of those provisions, it does substantially proceed contrary to them), this is a good ground for a prohibition. If it were necessary to the decision of your Lordships' question, that the judges should affirm or deny this proposition in the extent in which I have stated it, we should have found ourselves obliged to request the indulgence of farther time for the examination of the terms of the proposition. It undoubtedly belongs to the king's temporal courts to restrain courts of peculiar jurisdiction from exceeding the bounds prescribed to them; and by far the greater part of the instances in our books, in which prohibitions have issued, are cases of plain excess of jurisdiction. But some of the instances go beyond an excess of jurisdiction, and seem rather to fall under the head of wrong and injustice done to the party, by refusing him, in the course of a proceeding strictly within the jurisdiction, some benefit or advantage to which the common or statute law intitled him, perhaps in opposition to the civil or canon law, by which the general proceedings of those courts are regulated. The case of a lease (*a*), offered to be proved in an ecclesiastical court by one witness, and rejected because by their law two witnesses are necessary, and the case of a copy of the libel, which by the statute law they are required to give, demanded and refused, are among those instances. On the other hand, it must be admitted that the misinterpretation of either the common or statute law, in a proceeding confessedly within the jurisdiction of those courts, and where they are bound to exercise their judgment upon the one or the other, seems to be rather a matter of error, to be redressed in the course of the appeal which the law has provided, than a ground for a prohibition. The answer to this is, that the king's temporal courts, and your Lordships in the last instance, are, by the constitution of this country, to declare the common and ex-

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(*a*) 1 Show. 158. 172. *Shatter v. Friend*, 12 Co. 65 *b*. *Roberts's case*.

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pound the statute law, and that the possibility of two different rules prevailing upon the same law, one in the king's temporal courts, and the other in courts of peculiar jurisdiction, ought not to exist, and is effectually prevented without any unreasonable interference, or breaking in upon the courts of peculiar jurisdiction, by the temporal courts issuing their prohibitions in every such case. But this is no more than saying "proceed to the very extent of your jurisdiction without interruption from us, only remembering that you are always to declare the common law as we declare it, and that when any question arises touching the exposition of the statute law, if the subject is originally of temporal jurisdiction and comes incidentally before you, it is to be expounded by you as we expound it; or if the statute concerns your proceedings only, you are to expound it as we shall say it ought to be expounded, when the question is brought before us in prohibition." I understand the claim of the temporal courts, as it is stated in the famous controversy in the beginning of the reign of *James the First*(a), is to issue prohibitions to this extent; and though some of the cases in our books have been ably distinguished at the bar, and made reducible to the head of excess of jurisdiction, yet we find traces of continual claim to issue prohibitions in the instances above mentioned. In the case of [537] *Brymer v. Atkins*(b) in the Court of Common Pleas it is stated broadly and distinctly asserted; and in *Full v. Hutchins*(c), Lord *Mansfield*, in delivering the opinion of the Court, plainly alluded to it in the following passage: "where matters which are triable at common law, arise incidentally in a cause, and the Ecclesiastical Court has jurisdiction in the principal point, this court will not grant a prohibition *to stay trial*. For instance, if the construction of an act of Parliament comes in question, or a release be pleaded, they shall not be prohibited, unless the Court proceed to *try* contrary to the principles and course of the common law, as if they refuse one witness, &c.; and this is expressly laid down by Lord *Halk*, 2 *Lev.* 64. *Sir W. Juxon v. Lord Byron*." But it must be remembered, that in the argument of this very case in the Court of King's Bench, this doctrine was questioned by one of the

(a) 2 Inst. 601, 602. Art. Cleri. 4 Inst. 99, 100.

(b) *Ante*, vol. 1. 164.

(c) Cowp. 422.

learned

learned judges of that court(*a*), upon the general principle that the misinterpretation of an act of Parliament would be the subject of *appeal*, and *not of prohibition*, upon the authority likewise of a passage in Chief Justice *Vaughan's* argument of one of the cases reported by him, distinguishing between statutes directory to the Ecclesiastical Court and other statutes, and upon other grounds, which will be very fit to be considered, when it shall become necessary to the determination of a case in judgment before a temporal court in prohibition, to lay down the precise rule upon it. It is not necessary so to do in the present case, since we all agree, that allowing the Plaintiff all he has assumed respecting the authority of the Court of Common Pleas to issue a prohibition, he has made no ground for it in the declaration, for he has not shewn that the Prize Court has contravened the prize acts, either directly or by mistaking the sense of them. It is said in the declaration (I state the substance of it), that by the prize acts the property of ships taken by the navy after condemnation vests in the captors. This is true *sub modo*, but in the sense in which it is true, it has no application to the case stated in the declaration. To give it application, they say that the navy were the captors of the ship named in the pleadings, which, if we are to understand them to mean sole captors, in whom the sole property by the prize act would vest, is an averment inadmissible, ill pleaded, and therefore to be rejected as being directly contrary to the sentence of condemnation. They proceed to aver, that by the prize acts the navy agents have the entire disposition of the prize, and that *Pasley* was the surviving navy agent duly appointed, from whence they infer their *gravamen*, that a proceeding to take the ship and cargo out of his hands, defeats and disappoints the provisions of the prize acts, and is therefore such a contravention of those acts, as will be a ground for a prohibition. Not to quarrel with the title of *Pasley* to act as an agent, it is obvious that the third proposition, that the navy agents have the entire disposition of the prize, depends on the second, namely, that the navy were the captors; for if the navy were not the captors, or not the sole captors, in the one case they cannot have the entire disposition of the prize, upon any reasonable construction of the prize act, and in the other they would have nothing to do with it. But if it were admitted that

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(*a*) See the opinion of *Buller, J.*, 4 Term Rep. B. R. 327.

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they had made out every one of these propositions, still their conclusion would fail; for in order to maintain that the Prize Court had contravened the prize acts, by proceeding to take the ship and cargo out of the hands of the navy agent, it ought to have been stated in the declaration, *that it had been pleaded and alleged in the Prize Court*, that *Pasley* was the agent of the navy duly appointed, and therefore that the Court ought not to proceed to take the ship and cargo out of his hands. Upon a view of the precedents in *Rastall*(a) and *Coke*(b), it appears to me to have been a constant form of declaring, that the Court proceeded in the course objected to, notwithstanding the party had pleaded and alleged the statutes of which he claimed the benefit, and the facts which were necessary to bring his case within those statutes. And it seems to be a substantial defect in this case, because apparently it would be the duty of the Court, after it had pronounced such a sentence as would vest the property in the captors, in order to execute that sentence, to take all the necessary steps for delivering the ship and cargo into the hands of such persons as should be made appear to the Court to be the agents for the captors duly appointed. It was indeed thrown out in the argument at the Bar, that the judge of the Prize Court is to be considered after sentence as *functus officio*, and consequently that his monition, or any other proceeding, would be an excess of jurisdiction. This, if it could be maintained, would reduce the case to a short point, and would be a very clear and distinct ground for a prohibition. But we find no ground for this argument in the acts of Parliament, or in the common law, and if we were to suppose that such a monition had not been strictly warranted by their own course of proceeding in the Prize Courts, your Lordships, who cannot look beyond this record, cannot take cognizance of an irregularity of this nature. But in truth there is no ground for this argument. In the nature of things, the proceeds of ships and goods taken as prize, must often find their way to the hands of those who have no right to retain them; it is therefore essential to the prize jurisdiction, that the Prize Courts should have power to call for them, for the benefit of the captors. Several cases have been stated to your Lordships, where such monitions have in fact issued, and where the captors conceived that it would be for their benefit that they should issue.

(a) Rast..Entr. tit. Prohibition, 445. (b) Coke's Entr. tit. Prohibition, 448.

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It was admitted by the counsel at the bar, that such monitions may issue; it is therefore untrue, as a general proposition, that after sentence the Prize Court is *functus officio*, and cannot issue such a monition; and if it were true, it would be but an irregularity in their proceedings according to their own law, of which your Lordships could not take cognizance, and which therefore you could not pronounce to be an excess of jurisdiction.

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I return to the examination of the propositions stated in the declaration, with reference to the prize acts. By the prize act 19 Geo. 3. c. 67. and I observe no variation of phrase in the 21 Geo. 3. c. 15, “the flag officers, commanders, and other officers, seamen, marines, and soldiers, on board every ship and vessel of war in his majesty’s pay, *shall have the sole interest and property*, of and in all and every the ship, vessel, goods and merchandizes, which they shall take, after the same shall have been finally adjudged lawful prize to his majesty, in any of his majesty’s Courts of Admiralty in *Great Britain*, or in the plantations, or elsewhere, to be divided in such proportions, and in such manner, as his majesty by his proclamation had ordered, or should order by proclamations to be issued.” It seems to have been agreed throughout the discussion of this case, that this is a grant by the king in parliament to the captors, of his interest in captures made by the navy. The language of these prize acts is, that the navy shall have the *sole interest and property* in the ships and goods which shall be captured; the word *vest* is not used, yet we heard a great deal in the argument respecting the *vesting* of this sole interest and property. But it was not very distinctly stated *at what time* this sole interest and property should *vest*; the statutes say, *after the same shall have been finally adjudged lawful prize to his majesty*. They who are at all conversant with the proceedings in prize causes, know that there is nothing definite in these words, considered as the description of a point of time when this property shall vest, within the whole interval, between the original sentence of condemnation in the court of prize in which the ship is first libelled, and final sentence of condemnation in the court of appeal in prize causes. What happens in this case happens in many others. The judge condemns the ship and cargo as prize, reserving the consideration of the question, who were the captors. It is agreed on all hands, that since the passing of the prize

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prize acts the prize court has jurisdiction to determine who are the captors, a question often litigated in the first instance. If there be no doubt but that the ship is good prize, but perhaps great doubt who will ultimately turn out to be the captors, the judge pronounces by his interlocutory sentence that the ship is lawful prize, and thereupon makes many convenient arrangements for the benefit of those who shall eventually turn out to be the captors, reserving the question who are the captors for future consideration. It also often happens, that there are no parties litigating that question until after the definitive sentence has been pronounced in the court below. The strongest of two or more joint captors takes possession of the prize at sea, carries her into a port in the plantations, and procures her to be condemned there to himself as sole captor. The joint captor does not arrive till after the sentence; he may then interpose his claim, and may appeal, and have the benefit of his claim upon the hearing of the appeal. The effect of the appeal is to suspend the force of the sentence, not always indeed to the extent of staying the execution, for in certain cases the execution of the sentence is directed not to be suspended. But from the moment of the appeal being interposed, the sentence is no longer final; on the contrary, it is liable to be reversed in part, or in the whole. At what period then shall we say, that the sole interest and property of ships or goods captured by the navy shall vest in the captors? This point was but indistinctly argued at the bar. It was rather insinuated than argued, that in this case the interest and property vested as soon as the judge below pronounced his interlocutory decree, that the ship was good prize, reserving the question who were the captors. But it is a construction of the statute too absurd to be seriously maintained, that the property which by the express words of the statute is not to be had by the captors, till after the ship shall have been finally adjudged lawful prize to his majesty, should vest in persons of a certain description before it is known who shall answer that description. Does this interest and property vest as soon as by possibility it could vest, by the effect of a definitive sentence adjudging the ship to be prize, and who were the captors? If there be no appeal, it may then vest. But suppose an appeal interposed by the express words of the prize act, it cannot vest until after the final adjudication. And the effect of an appeal being such as I have stated it to be, can there

there be said to have been a final adjudication, while an appeal is depending? Shall the interest and property vest only to be divested if the event of the appeal should be against the persons first adjudged to be the captors? Such a construction is not necessary to effectuate any of the purposes of the act, and is not simply unnecessary, but it would break in upon the general course of proceeding in the prize court, and frustrate some of the provisions of the prize acts made in aid of the authority of that court; at least, it is entirely inconsistent with them. It is not necessary to secure the prize to the captors; for I take it to be clear, and it was so stated by the civilians and agreed by the Court in the case of *Smart v. Wolff* (a), that pending the suit in the prize court, the ship and goods are in the custody of the Court. The interests therefore of all those who are concerned in the capture, are under the protection of the Court. We do not want to be intimately acquainted with the course of proceeding in those courts, to see how beneficial this principle is to all the parties concerned in interest. We need only turn to the prize acts to see the use of it to preserve the ship and cargo, or the value of it, to those who shall ultimately be found to have the interest and property in it. It cannot therefore be necessary in order to give effect to the prize acts, that the property should be vested in any person before the final adjudication. And when I refer your Lordships to the 27th section of the 19 *Geo. 3. c. 67.* which provides that in certain cases, even after sentence, the ship and cargo may be delivered up to the claimant, or sold by the authority of the Court at the request of the claimant, your Lordships will see how perfectly inconsistent with the plan of the prize act this notion of the interest and property vesting in the captors, at any time before the final adjudication in the court of appeal, will be found to be. In truth, so far from the interest and property vesting at an earlier period, the legislature by the words "until, &c." seems to have cautiously guarded against its being so understood.

The allegations contained in this declaration respecting the appointment of the agents directed by the prize acts to be appointed for selling prizes and distributing the proceeds among the captors, their powers, proceedings, and the conclusion against the authority of the commissioners of prizes to inter-

a) 3 Term Rep. B. R. 323.

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fere with them, are so connected with this question respecting the vesting of the interest and property in the captors, that I shall consider them in the next place. Those allegations are, “ that *Edward Taylor* since deceased, and *John Pasley*, were “ duly appointed agents by the officers and crews of the several ship companies of the said squadron, and did soon “ after the said decree of the said 4th day of *September* 1782, “ as such agents, cause the said ship called the *Hoogskarpe*, “ together with the unclaimed goods, wares, and merchandizes, “ taken in and on board the same to be sold, and did receive “ divers large sums of money, being the produce of the same, “ part of which said sums of money was distributed by the said “ *Edward Taylor* and *John Pasley* among the officers and crews “ of the said squadron under the command of the said *George Johnstone*, and the residue thereof now remains in the hands “ of the said *John Pasley*, and by him ought to be distributed “ to the captors aforesaid in payment of their several shares, “ in pursuance of the said statute, and of the said proclamation of our said lord the king. And whereas the said *Rodham* did, in *Easter* term, in the twenty-eighth year of the “ reign of our lord the now king, in the court of our lord the “ king of the Bench here at *Westminster*, implead the said *John Pasley* in a certain plea of trespass on the case, on promises, “ for the purpose of recovering from the said *John Pasley* his “ damages by him sustained, by reason of the said *John Pasley* “ having neglected and refused to pay to him his share of the “ produce of the said ship, and of the goods and merchandizes “ so as aforesaid taken in and on board the same, and so as “ aforesaid condemned as lawful prize to our said lord the king, “ and which said plea is still depending in the said court of the “ Bench here at *Westminster* : and whereas, the said commissioners of appeal in matters of prize, have not, by the law “ of this realm, any power or authority to take out of the hands “ and possession of any agent or agents so constituted as aforesaid, the money arising from the sale or sales of any ship, “ vessel, goods, wares, or merchandizes, taken from the said “ States General of the United Provinces, or their subjects “ during the said hostilities, by any ship or vessel of war in “ his majesty’s pay, which have been *finally adjudged* lawful “ prize to his majesty in any of his said courts of Admiralty in “ *Great Britain*, or to compel them to bring in the same, &c.”

I shall

I shall not quarrel with *Pasley's* title to be an agent, however informally it may appear to be stated, nor do I think it a substantial objection, that he may have been appointed before any interest or property vested in the persons who appointed him; but if it be the true construction of the prize acts, that *no interest or property vested* in the navy until after the *final adjudication* by the commissioners of appeals, it follows that his proceeding to sell and to distribute part of the proceeds soon after the sentence in the admiralty court, must be without colour of authority. In this stage of the proceedings, the agents could only act under the authority of the prize court, and in the manner in which such agents usually do act; for I take it to be clear, in point of fact, that agents are frequently appointed before sentence, and that the captured ships and goods are left under their care and management, by common assent.

Acting under the authority of the prize court, they would be to account to the prize court; acting without the authority of the prize court, they would be in the condition of mere strangers, who had possessed themselves of the proceeds of a prize, to whom, it is admitted, a monition might, and ought to be issued, to compel them to bring in those proceeds. The allegations therefore, which respect the appointment of agents and their proceedings, are insufficient in law to warrant the conclusion which is the main ground of this prohibition, that the commissioners of prize appeals had no power to take the proceeds of this ship and cargo out of their hands. I might add, they prove the direct contrary. The case here is the stronger against the authority of these agents, inasmuch as upon the interposing of the appeal, there was no direction that the execution of the sentence should not be suspended; so that the whole effect of the first sentence of adjudication became inoperative to any purpose whatsoever, and there was no pretence for the agents assuming to act by virtue of it. If we turn once more to the prize acts, and take a view of those sections which respect the appointment, powers and duties of these navy agents, we shall find, that though perhaps, as I have before observed, they may be appointed before the final adjudication of the prize, they have nothing to do until after the final adjudication has taken place; that the provisions of the prize act are in perfect conformity to the powers and authorities vested in the prize court up to that period, and that they are consistent with

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the opinion which I have now delivered respecting the interest and property of their principals, I refer to the 31st and subsequent sections. By the 31st section, all appraisements and sales of ships or goods taken by the navy are to be made by the agents, which must be appraisements and sales after final adjudication; for all appraisements and sales to be made at any time prior to the final adjudication, are to be made under the order of a judge of the admiralty court, and under the direction of persons to be appointed by *claimants* as well as captors. By the 33d section, they are directed to register their powers of attorney in that court in which the prize shall be condemned; and by the 34th section, the entry is to contain, among other things, the date of the condemnation. I will not fatigue your Lordships by going through the different sections which give powers, or impose duties upon these agents; I shall content myself with stating the result, *viz.* that they all respect sales in order to distribution, and the interests of *Greenwich Hospital* arising out of those sales. The result of these observations upon those parts of the declaration which respect the interest and property of the navy as captors, and the powers and authorities of their agents, is, that this whole case rests upon two *fundamental errors*; the first, that an interest and property *vested* in the navy as captors, long before it could by any possibility vest; the second, that the *navy agents* had *authority* under the prize acts, to take upon themselves the *management and disposition* of the prize long before such authority could be derived to them. When this is distinctly seen, the whole falls to the ground. Hitherto, I have treated the case as if the navy were to be considered, as they are stated in this declaration to have been, the *sole captors*. But the contrary is, or at least must be taken to be upon these pleadings, the fact. It is from the sentence only that we can collect who were the captors. Your Lordships cannot take cognizance of it as a matter of fact to be averred in pleading; it is a matter of adjudication by a court of exclusive jurisdiction. You must have it under the sanction of the judicial authority of that court, or no notice at all can be taken of it. The averment in the declaration is therefore impertinent and must be rejected, and we must look at the sentence. Looking at the sentence, and not having the assistance of the libel and the rest of the proceedings in the cause which might have explained it, but which

which the Plaintiff has not thought fit to introduce into his declaration, and in the character in which I now address your Lordships, I dare not undertake to say what this sentence is, but I can venture to say what it is not. It is *not an adjudication, that the navy were the sole captors* of this *Dutch* ship. The Plaintiff, therefore, has failed altogether to maintain that proposition. If it could be of use to him, he might possibly succeed in an attempt to prove that this sentence does adjudge that the navy were joint captors. But this would be of no use to him in this cause. It is not the case which he makes by his declaration, and if it were, the conclusion in favour of the jurisdiction of the prize court with respect to the issuing the monition, would be irresistible. The prize acts would then be quite out of the case, which would rest entirely upon the ordinary jurisdiction of the prize courts. As joint captors, the navy can never have the sole interest and property in the prize: the navy agents cannot have the sole management and disposition of it. The prize acts have not provided for the case of joint captors. The prize courts may have extended the benefit of the statutes to the case of some joint captures, by an equitable arrangement and distribution which has been submitted to: but it appears to me to be perfectly impossible to found a right to the *sole agency*, upon a *joint capture*: and indeed I do not apprehend, that under the prize acts a joint agency could be framed, which would be effectual. The consequence of all this is, that of necessity this monition must issue in order to execute the sentence, if we understand the sentence to have adjudged that the navy were joint captors. I might here conclude what I have to offer to your Lordships, but as it was very apparent to those who watched the course of the argument at the bar, that in truth it is the *sentence* of the commissioners of prize appeals, and not the monition which is the real ground of complaint, it may be necessary for me to take some further notice of it, in order to shew your Lordships that every complaint against the sentence must be laid out of the case. You are sitting here in a court of error, but your jurisdiction is now confined to the inquiry, whether the ground stated in this declaration for issuing such a prohibition as that which is described in these pleadings, is or is not sufficient in law. The sentence is before your Lordships as part of that ground, and the effect of it in that view, I have already stated. But it is

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before your Lordships as a sentence unimpeached. The complaint made to the temporal court is not that the sentence is wrong, which indeed the temporal court had no jurisdiction to correct if it were wrong, nor is the complaint that the sentence was an excess of jurisdiction, or in any other respect a ground for prohibiting the prize court to carry it into execution. The case in the declaration is, that upon the authority of the sentence coupled with the other matters of fact and law stated in the declaration, the Plaintiff is intitled to ask, that the proceeds should not be taken out of the hands of the navy agents; and the Plaintiff cannot now desert that ground when he finds it untenable, and take up an objection to the sentence. Your Lordships are not a court of original jurisdiction to grant prohibitions; and indeed, the cause and the parties would be placed in a very singular situation, and if there could now be a prohibition issued to prevent the carrying this sentence into execution; for the sentence of the court below is undoubtedly reversed, and if the commissioners of prize appeals were to be prohibited from carrying into execution the sentence of reversal, there would in effect be no sentence at all, and the crown, the navy, and the army, as far as I see, would be without remedy. In the course in which the commissioners of prizes are proceeding, regular or irregular, the proceeds of this prize will be collected; and if the object of their proceedings be, as probably it is, to place the fund in the hands of the crown, the honor and justice of the crown will be an unfailing resource to the parties.

The judgment of the Court of King's Bench, reversing that of the Court of Common Pleas, was accordingly affirmed.

Monday,
 June 22d.

EVANS *against* BRANDER and Another.

In an action on the case against the sheriff for taking insufficient pledges in replevin, he is liable in damages to the extent of double the value of the goods distrained, but no farther (a).

THIS was an action on the case against the sheriff of *Mid-
 dlesex*, and the declaration stated, that the Plaintiff distrained certain goods of one *John Hardwicke* for arrears of rent amounting to 13*l.* 18*s.* 3*d.* that they were replevied, and a

(a) [Vide *ante*, p. 36. note (a).]

plaint levied in the county court which was removed by *re. fa. lo.* into this court, and that *Hardwicke* had *found pledges* to prosecute and also for a return of the goods, if a return should be adjudged, to wit, *William Chapman* and *George Grove*: the proceedings were then set forth, and that there was judgment for the avowant (the now Plaintiff,) for a return of the goods and 58*l.* costs. The writ *de retorno habendo* was then stated, with a return of *elongata*. And the Plaintiff averred that the Defendants not regarding the *statute in such case made*, nor the duty of their office, &c. &c. did not, before the replevying and delivering the said goods and chattels to the said *John Hardwicke*, take from him *pledges* sufficient, as well for the said goods and chattels being returned, if return thereof should be adjudged, as for the said *John Hardwicke* prosecuting his said plaint, which according to the form of the statute, &c. they ought to have done; and that the said *William Chapman* and *George Grove* at the time of their becoming *pledges*, &c. were not, nor was either of them sufficient to answer for the goods being returned, nor for *the value* of them, &c. &c. Whereby the Plaintiff lost the benefit of the distress, &c. &c.

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At the trial it appeared that the rent in arrear was 13*l.* 18*s.* 3*d.*, the value of the goods distrained 17*l.* 5*s.* 3*d.*, the costs of the replevin suit 58*l.* 10*s.*, of the *retorn. habend.* 4*l.* 1*s.* 10*d.*, and the penalty of the bond 80*l.*; and the damages given by the jury were 76*l.* 0*s.* 1*d.* which were obviously made up of the costs of the replevin, of the *retorn. habend.* and the rent.

A rule having been granted to shew cause why the damages should not be reduced to the amount of the *rent in arrear*, *Bond*, *Serjt.*, shewed cause. The Plaintiff is intitled to recover a satisfaction to the extent of the damages found. The remedy by distress was originally substituted in lieu of the forfeiture of the land, which in the strictness of the old feudal law was occasioned by the non-performance of the services. *Gilb. Law of Distr.* 2. As this remedy was less powerful than the forfeiture, the lord was intitled to keep the thing distrained till the tenant offered gages and pledges for the payment of the rent, or the performance of the services. But notwithstanding the offer of gages and pledges if the lord persisted in detaining the distress, the tenant was obliged to resort to the writ of replevin, in which he complained that the Defendant had

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1795. taken and unjustly detained the goods “*against gages and pledges* ;” the form of which is still preserved in declarations in replevin. But in this case the lord might wage his law, as to the sufficiency of the gages and pledges. *Gilb. Law of Distr.* 90. 1 *Reeve’s Hist.* 47. In the earliest times therefore, the law was careful to make the remedy by distress as beneficial to the lord as possible. But it frequently happened, that by allowing the tenant to replevy the goods distrained, the lord was deprived of the benefit of the distress, for if the tenant sold them pending the suit and became insolvent, the lord had no advantage from the judgment for a return: for the pledges to prosecute were like pledges in other actions, and liable only for the amercement to the king *pro falso clamore*. In consequence of this, the stat. *West. 2. 13 Ed. 1. c. 2.* enacted, that the sheriff should not only take pledges to prosecute, but also to return the cattle if a return should be adjudged. If there was judgment for a return the writ *de retorno habendo* issued, to which if the sheriff returned *elongata*, the avowant might have a *scire facias* against the pledges, and if they shewed no good cause, a special writ to take their cattle in the room of those that were eloined. If there was a return of *nihil* to the writ against the pledges, a *scire facias* lay against the sheriff to recover *tot averia*. 2 *Inst.* 340. *Gilb. Repl.* 126. By degrees an auxiliary remedy against the sheriff was introduced, that of an action on the case for taking insufficient pledges, which was resorted to in lieu of the *scire facias*. In this action, which sounds entirely in damages, the avowant was intitled to recover the same satisfaction as he would have had, if the cattle had been returned to him irreplevisable, in which case the owner could not have them delivered back to him without tendering, not only the arrearages of rent, &c. 2 *Inst.* 341. (which &c. may include damages,) but “*all that was due upon the judgment in the avowry*,” *ibid.* 107. And when there is judgment for the avowant, damages and costs are due to him by the provisions of the stat. 21 *Hen. 8. c. 19.* However therefore on a *scire facias*, the responsibility of the sheriff might be limited by *the price of the beasts*, or the *tot averia* mentioned in the stat. *West. 2. c. 2.* yet a greater latitude might be allowed in an action on the case, from the nature of that species of remedy. It is by a liberal construction of the statute

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tute adopted in later times, that an action upon the case is holden to lie. 16 *Vin. Abr.* 400. *Prowse v. Pattison* (a), *Bull. N. P.* 60. *ante*, 39. *S. C.* where it appears, that upon searching the record the damages were made of the rent in arrear and the costs of the replevin. So also in *Gibson v. Burnell*, *C. B.* 30 *Geo.* 3. (b), *Gould, J.*, before whom the action was tried, held that the Plaintiff might recover the costs of the replevin suit as well as the rent in arrear. So too in *Concanen v. Lethbridge*, *ante*, 36. this Court held, that the action being against a public officer for a neglect of the duties of his office, the Plaintiff was intitled to recover the whole damages sustained, which case being subsequent in point of time to *Yea v. Lethbridge*, 4 *Term Rep. B. R.* 433. must be taken to have over-ruled it. Upon the same principle likewise in *Richards v. Acton*, 2 *Black.* 1220. the Court upon motion held that the high sheriff, under-sheriff and replevin clerk, were all answerable for the sufficiency of the pledges, and ordered them to pay the rent in arrear together with the damages and costs.

[Lord Ch. J. As the bond was not taken in double the value of the goods distrained according to the directions of the statute 11 *Geo.* 2. c. 19. was it good?]

It was good as against the sheriff. Besides, this is an action for taking insufficient *pledges* on the stat. *West.* 2. c. 2., not insufficient sureties (c) on the 11 *Geo.* 2. c. 19., and there is no particular limitation of the sum in which those pledges shall be bound. The bond therefore may be considered as taken

(a) There called *Rous v. Patterson*.

(b) Cited 4 *Term Rep. B. R.* 454.

(c) Though this distinction may seem at first sight to be warranted by the form of the declaration in this case, especially if compared with that in *Concanen v. Lethbridge*, *ante*, 36. which followed the words of the stat. 11 *Geo.* 2. c. 19., yet it is in reality without foundation. Before the passing the stat. 11 *Geo.* 2. c. 19. the constant usage was to take a bond from the pledges in replevin, on the stat. *West.* 2. c. 2. the word *plegi* being holden to be synonymous with *sureties*, according to *Holt* and *Treby*, Ch. J. 1 *Lord Raym.* 278. See also *Lutw.* 687. *Dalton, Sher.* 438. ch. 113. But the sum in which the bond should be taken, appears not to have been defined. To make the security more effectual by fixing the responsi-

bility of the pledges, and allowing the bond to be assigned with a view to prevent vexatious replevins, was the object of the 23d section of the stat. 11 *Geo.* 2. c. 19. which has rather modified and improved the former security than created a new one. The pledges therefore required by the stat. *West.* 2. c. 2. and the sureties by the 11 *Geo.* 2. c. 19. are in effect the same; and in practice no more than one bond is ever taken. It seems then highly reasonable, though the stat. *West.* 2. c. 2. directs that the sheriff shall be answerable for the *price of the beasts* if the pledges are insufficient, yet since the stat. 11 *Geo.* 2. c. 19. s. 23. made in *pari materiâ* has enlarged the security to a given extent, that he should be liable to the same extent in an action on the case.

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[Lord Ch. J. The sureties under the stat. 11 *Geo. 2. c. 19.* seem to have been substituted in lieu of the pledges under the stat. *West. 2.*]

Bond was going on with his argument, when the Court interfered and said, that notwithstanding the late determinations on the subject, the good sense and justice of the case seemed to be, that the sheriff should be liable no farther than the sureties would have been, if he had done his duty and taken a bond under the stat. 11 *Geo. 2. c. 19.* and they had been sufficient; that their responsibility was limited by that statute to double the value of the goods distrained, which sum ought to be the measure of damages against the sheriff. The Court therefore recommended to the counsel on both sides to agree to reduce the sum found by the jury to that level; in which they seemed to acquiesce. The rule therefore to reduce the damages to the rent in arrear was discharged, and another rule to reduce them to the amount of double the value of the goods distrained, was
Made absolute.

END OF TRINITY TERM.

[In the last Edition of these Reports, the rules of *Hilary* Term, 35 *Geo. III.* which will be found at 441, *ante*, were inserted in this place.]

C A S E S

ARGUED AND DETERMINED

1795.

IN THE

Court of COMMON PLEAS,

IN

Michaelmas Term,

In the Thirty-sixth Year of the Reign of GEORGE III.

D'EGUINO *against* BEWICKE.

Saturday,
Nov. 7th.

THIS was an action on a policy of insurance, the facts of which were the following:—The policy was effected September 10th 1793, on goods on board the ship *Little Betsey*, on a voyage at and from *London* to *St. Sebastian* in *Spain*, warranted to depart with convoy for the voyage. No convoy was appointed directly to *St. Sebastian*, but on the 7th of *November* the ship sailed from *Spithead*, under convoy of a squadron of frigates, the commander of which had orders from the admiralty, “to take with him the *Dido* frigate and *Weazle* sloop of war, “and proceed to *Gibraltar*, and to take with him the trade “bound to *Gibraltar*, and also such ships as should be at Spit- “head bound to *Bilboa*, and to detach the *Weazle* with the lat- “ter, with orders to see them safe to *Bilboa*, and after so doing, “to return to *England*, taking under his convoy such vessels as “he should find at *Bilboa* bound for *England*.” On the 29th of *November* the commodore made a signal for the *Weazle* to part company, and take with her such ships as were bound to

A policy of insurance is effected on a ship, on a voyage from *A.* to *C.* warranted to depart with convoy for the voyage. The convoy appointed is to *B.* a port in the course and near to *C.*

This is a compliance with the warranty, and the underwriters are liable, the ship being captured in the passage from *B.* to *C.* The term

convoy, in a policy, means such a convoy as shall be appointed by government (a).

(a) [Vide *De Garay v. Clagget*, Park, Ins. 455. 6th edit. *Audley v. Duff*, 2 Bos. & Pull. 111.]

Bilboa

1795. *Bilboa* and *St. Sebastian*, the captain * of the *Weazle* having had previous instructions from the commodore “to take, when the “signal to part company should be made, the vessels bound to “*Bilboa* and *St. Sebastian* under his convoy, and see them in “safety off *Bilboa*, there to inquire if there were any vessels “bound to *England*, and to take any such under his convoy to “*Spithead*.” The *Weazle* accordingly left the rest of the fleet, taking the *Little Betsey* and other ships under convoy for *Bilboa* and *Sebastian*, but soon after parted from them in chace of a strange ship, and did not afterwards join them. The *Little Betsey* arrived in safety off *Bilboa*, which was in her course to *St. Sebastian*, but was taken by the *French* in her passage between the former port and the latter.

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At the trial, it was objected that the warranty had not been complied with, the convoy being only to *Bilboa*; but the Lord Chief Justice left it to the Jury to determine whether there was not a sufficient convoy within the meaning of the policy, and a verdict was found for the Plaintiff.

A new trial was now moved for by *Le Blanc*, Serjt., who contended that warranties were to be strictly construed, that there was a non-compliance with the warranty in this case, and the Plaintiff was therefore not entitled to recover: that however near the port of *St. Sebastian* might be to *Bilboa* (a), the principle was the same, and a convoy to *Bilboa* could no more be construed to be a convoy to *St. Sebastian*, than a convoy to the *Cape of Good Hope* would be a convoy to the *East Indies*: and he cited the case of *Hibbert v. Pigou*, *Parke's Insurance*, 339.

BULLER, J. The case of *Hibbert v. Pigou* is not applicable to this, for there a convoy was appointed and actually sailed from *Jamaica* to *England*. As to my Brother *Le Blanc's* instance of a convoy to the *Cape of Good Hope*, I entirely differ from him in that point, for if Government thought a convoy to the *Cape* was a sufficient protection to the *East India* trade, and the usage were for the *East India* ships to sail with a convoy only to the *Cape*, and to consider that as the *East India* convoy, and no other convoy was appointed to the *East Indies*, I should hold that the warranty was complied with; though I agree, that if there were another convoy to the *East Indies*, it would be other-

(a) From the nearness of *St. Sebastian* to *Bilboa*, it seems that if the *Weazle* had continued in company

with the convoy, she would have afforded protection to ships going to both ports.

wise. The *captain of a merchant ship has nothing to do with, nor can he know the instructions from the Admiralty to the King's officers, but must take such convoy as he finds. I am therefore of opinion that there is no ground at all for this motion.

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HEATH, J., of the same opinion. The owner of a ship, when he makes an insurance, cannot know the orders of the Admiralty respecting convoys.

ROOKE, J. The ground stated by my Brother *Le Blanc* seems to me to be more fit for the Jury than the Court, and the Jury have found that the convoy was sufficient.

LORD CH. J. EYRE. I am satisfied with the finding of the Jury.

Rule refused.

QUIN, Executrix of QUIN, *against* KEEFE.

Thursday,
Nov. 19th.

THE testator and the Defendant both being resident in this country, the Defendant contracted a debt to the testator for work and labour, for which the executrix held him to bail. Upon this a rule was obtained to shew cause why he should not be discharged on entering a common appearance, on the ground that he had become a bankrupt in *Ireland*, and there obtained a certificate.

The Court will not discharge a Defendant, who is holden to bail for a debt contracted in this country, out of custody, on a common ap-

pearance, on an affidavit of his having become a bankrupt in *Ireland*, and there obtained his certificate, but will put him to plead. But a general plea of bankruptcy in *Ireland*, referring to an *Irish* act of parliament, and concluding to the country (in a mode similar to that given by stat. 5 G. 2. c. 80. s. 7. to bankrupts in *England*) is clearly bad (a).

(a) [Where a debt is contracted in a foreign country, a discharge according to the law of that country is a bar to an action brought in our own courts, *Ballantine v. Golding*, Co. B. L. 347. 1st edit. *Potter v. Brown*, 5 East, 124. But not where by the foreign law the remedy only is barred, *Williams v. Jones*, 13 East, 439.; and a foreign bankruptcy and certificate is no bar to a demand for a debt contracted in *England*, *Smith v. Buchanan*, 1 East, 6. *Lewis v. Owen*, 4 B. & A. 654. But on the construction of the statute 54 G. 3. c. 137. it has been held, that a debt contracted in *England* by a trader residing in *Scotland*, is barred by a discharge un-

der a sequestration issued in conformity to that statute, in like manner as debts contracted in *Scotland*, *Sedgway v. Hay*, 2 B. & C. 12. See also *Odwin v. Forbes*, 1 Buck, 57. and the judgment in the same case, reported by J. Henry, Esq. *The Royal Bank of Scotland v. Cuthbert*, 1 Rose, 462. That the Court will not discharge the Defendant upon motion, on the ground of a foreign certificate, but will put him to plead his discharge, see *Philpotts v. Reed*, 1 Brod. & Bing. 13. *Bamfield v. Anderson*, 5 B. Moore, 331. *Whittingham v. De la Rieu*, 2 Chitty's Rep. 53. *Earlier v. Languishe*, id. 55.]

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Le Blanc shewed cause. *Ireland* is clearly a foreign country, and there is no instance of a certificate or any thing analogous to it, in a foreign country, being allowed to be a bar to the recovery of a debt contracted here; for, according to the opinion of Lord *Talbot*, a certificate here would be no bar to such recovery in the Plantations. *Beawe's Lex Merc.* 531. *last edit.* If the debt had arisen in *Ireland*, and the party had obtained his certificate in that country, the courts here, by the courtesy of nations, would give effect to it, if the Plaintiff were to attempt to enforce the contract here. But it is totally a different thing when the debt is contracted in this country, and the debtor attempts to evade the payment of it, by withdrawing himself to a foreign country, there becoming a bankrupt, and then setting up the bankrupt laws of that country as a defence. But at all events the Court will not interfere in a summary way, but will put the Defendant to plead.

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Adair, Serjt., *contra*. The operation of bankrupt laws in foreign countries is allowed, to many purposes, to have effect here, and the bankrupt laws of *England* are adopted in *Ireland*. Upon this principle, in a case of *Lynch v. M'Kenny*, where the Defendant, having contracted a debt in *Ireland*, came to *London*, there entered into partnership with one *Kay*, and afterwards became a bankrupt and obtained his certificate, but an *Irish* creditor, having discovered his residence in *England*, came here and held him to bail, Mr. Justice *Aston* made an order, dated *August* 21, 1776, to discharge him on filing common bail, on an affidavit that the debt became due previous to the issuing the commission, and his obtaining his certificate.

Lord Chief Justice. The ground ought to be perfectly plain where the Court is called upon to interfere in a summary way. If there is the least doubt, the party must put the matter upon record by pleading. I agree with the distinction made by my Brother *Le Blanc*, between the cases of a debt contracted in a foreign country and here, for by changing the *forum* the parties do not change the nature of the thing. But we cannot decide the question on this application.

BULLER, J. It is enough to say against this motion, that the point is new in this court. It is not new in the *King's Bench*, though I do not know that there is any case in print on the effect of a certificate in *Ireland* upon a debt contracted here. As to the order which Mr. J. *Aston* is stated to have made, in
that

that case the Defendant carried on trade, and became a bankrupt here, and the debt might have been proved under the commission here.

Rule discharged.

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against
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In consequence of the refusal of the Court to interfere, the Defendant pleaded “ For a general plea in this behalf, according to the form of the statute in such case made and provided (being the act of parliament after mentioned), that he the said Defendant after the 24th day of *June* 1772, mentioned in a certain act of parliament, intituled ‘An Act to Prevent Frauds committed by Bankrupts’, passed in a certain parliament of our lord the now king of this kingdom of *Ireland*, holden at *Dublin* in the said kingdom of *Ireland*, in the 11th and 12th years of the reign, &c. to which said parliament the right and authority of making laws in this behalf in the said kingdom of *Ireland* belonged, and before the suing out the original writ of the Plaintiff, to wit, on the 26th of *July* 1793, at *Dublin* aforesaid, became a bankrupt, within the intent and meaning of the said statute, and of other the laws then and now in force in the kingdom of *Ireland* concerning bankrupts, to wit, at *London*, &c. and that the said several causes of action aforesaid did accrue before such time as the Defendant so became a bankrupt as aforesaid”, and concluded to the country. [555]

At the trial at *Guildhall* a case was reserved, stating the facts above mentioned, which *Le Blanc* was now going to argue, when the Court observed that in the form in which the plea stood upon the record, it was clearly bad, and therefore the Plaintiff was entitled to judgment without entering further into the question.

Postea to the Plaintiff.

WILKES *against* ELLIS.

Thursday,
Nov. 19th.

THIS was an action of debt brought by the Chamberlain of *London*, on the stat. 6 *Anne*, c. 16. to recover the penalty given by that statute against the Defendant, for acting as a broker of *London*, by an auctioneer who has paid the duty of 20s. for a licence required by the stat. 17 *Geo.* 3. c. 50. but who has not been admitted as a broker, by the Court of Mayor and Aldermen, makes him liable to the penalty of the 6 *Ann.* c. 16. for acting as a broker without being so admitted? *Semble* that it does not.

Qu. Whether the selling goods by auction within the city

broker

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against
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broker within the city, not having been admitted as such by the Court of the Mayor and Aldermen; the offence being laid in the declaration to be, that “ he took upon himself to act as a “ broker, and as a broker for a certain reward to him to be “ therefore given, sold by auction for one *John Bailey*, certain “ goods and chattels, &c.”

The evidence at the trial was, that the Defendant, who was a freeman and liveryman of *London*, and had paid the duty of 20s. required by 17 *Geo. 3. c. 50.* as a *licensed auctioneer*, had sold the goods mentioned in the declaration by public auction for *Bailey* who was the owner of them, and on a case reserved, the question was, whether the Plaintiff was entitled to recover, *i. e.* whether the selling goods by public auction was acting as a broker, within the meaning of the statute?

This case was twice argued: the first time by *Rose*, Serjt., Recorder of *London*, for the Plaintiff, and *Cockell*, Serjt., for the Defendant; the second, by *Adair*, Serjt., for the Plaintiff, and *Le Blanc*, Serjt., for the Defendant. On the part of the Plaintiff the arguments were the following:—

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The Defendant having sold goods by auction, without being previously admitted as a broker by the Court of Mayor and Aldermen, has incurred the penalty of 25*l.* given by the statute 6 *Anne, c. 16.* the words of which are, “ That all persons that “ shall *act as brokers* within the city of *London* and liberties “ thereof, shall from time to time be admitted so to do by the “ Court of Mayor and Aldermen of the said city for the time “ being, under such restrictions and limitations for their honest “ and good behaviour, as that court shall think fit and reasonable.” Now a broker is a person, who for a reward makes a transfer of property, whether the transfer be by private contract or public sale. There is nothing in the mode of selling by auction that exempts the auctioneer from the capacity and situation of a broker, which arises out of the nature of a sale. Thus the word *auctio* in classical language means a sale by a broker, and *auctionem vendere*(a) is used in that sense by *Cicero in oratione pro*

(a) The Latinity of this phrase *auctionem vendere* is so very doubtful, that the commentators on *Tully*, with great reason, conjecture that the text in this place is imperfect. But however that may be, it is manifest in many other parts of the oration,

that the sale alluded to was a public sale by auction, and not such a one as would answer to the modern description of a sale by a broker. Thus in a preceding page it is said, “ *Auctionem* in *Galliâ* P. hic *Quintius Nar-* “ *bone se facturum esse proscribit* “ *earum*

pro P. Quintio. Ainsw. Dict. Thus too in legal phraseology the term *auxionarii* is interpreted to mean “brokers.” *Blount’s Law Dict.* And in *Spelman’s Glossary*, *auctionarii* are described to be “qui publicis subhastationibus præsunt,” “propolæ, quos “Anglicè *brokers* dicimus.”

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ELLIS.

In *Jacob’s Law Dict.* the word *brokers* is rendered “*brocarii et auctionarii*”, and *auctionarii* “sellers or retailers, but more properly *brokers*.”

And in the several acts of parliament to regulate the business of brokers, they are described to be persons who make bargains and contracts between other persons, concerning their goods and merchandize. 1 *Jac.* 1. c. 21. 8 & 9 *W. 3.* c. 20. s. 60. 8 & 9 *W. 3.* c. 32. 10 *Anne*, c. 19. s. 121. 6 *Geo.* 1. c. 18. s. 21. 3 *Geo.* 2. c. 31. 7 *Geo.* 2. c. 8. s. 8. Which description clearly comprehends an auctioneer, who is an agent both for the buyer and seller. Upon this principle, that broker is a generic term, including all persons who make bargains for the sale of property, many cases have been decided. Thus in *Bosworth v. Machado, cor. Lee*, Ch. J.(a), it was holden that a person who sold *South Sea* stock, was a broker within the meaning of the statute 6 *Anne*, c. 16. So also was the case of *Janson v. Green*, 4 *Burr.* 2103. If it should be said, that the stat. 17 *Geo.* 3. c. 50. imposes upon auctioneers in *London* and *Westminster*, an annual duty of 20s. for a licence, unless they are also authorized by the Mayor and Aldermen of *London*, to act as brokers within the city, in which case the duty is only 5s., and therefore that the two characters are distinct and independent of each other, or at least that an auctioneer who has paid the duty of 20s. is not obliged to pay a farther duty to the City of *London*, it is to be observed, that this statute is merely a revenue act, the sole object of which is the raising a tax for Government; that it did not mean to infringe the rights of the city, nor can it alter, in whatever manner it may be worded, the nature of the business of auctioneer and broker, and make things different, which are substantially the same. So general indeed has been the conviction that auctioneers were within the meaning of the stat. 6 *Anne*, c. 16. that

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“earum rerum, quæ ipsius erant privatae. Ibi tum vir optimus Sextus Nævius hominem multis verbis deterrēt, ne *auctionetur*; eum non ita commodè posse eo tempore, quæ

“*proscripsisset*, vendere.” And after a few sentences, “*auctionem velle facere* desistit.”

(a) At *Guildhall*, Sittings after *Trinity Term* 1745.

the

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the constant usage in the city has been, for them to be admitted as brokers by the court of Mayor and Aldermen.

On the part of the Defendant the arguments were the following. The true definition of a broker is, that of a person who makes a private bargain between other persons, but not a public one, *Cowel's Interpr.* In the stat. 1 *Jac.* 1. c. 21. he is described to be a person who makes bargains between merchant and merchant. A broker also both buys and sells, but an auctioneer only sells. A broker therefore is essentially different from an auctioneer. Brokers too are subject to the bankrupt laws by the provision of the stat. 5 *Geo.* 2. c. 30. s. 39. But auctioneers are not included in that provision. With respect to the definitions given in the several dictionaries, as they all differ from each other, perhaps there is little reliance to be placed on any.

By a charter of *Ed.* 3., no persons were to be brokers, but such as were chosen by the merchants belonging to the mysteries in which they were to act, which corresponds with the recital of the stat. 1 *Jac.* 1. c. 21, but which never could be extended to auctioneers. By a charter also of *Hen.* 7. confirmed by *Car.* 1. the business of selling by auction was confined to an officer called an Outroper (*a*), and all other persons were prohibited from selling goods or merchandize by public claim or outcry. But long before, and at that time, brokers exercised their trade in the manner described in the stat. 1 *Jac.*

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1. c. 21. The two characters were therefore different at that time, and the difference between them is most evidently recognized by the stat. 17 *Geo.* 3. c. 50, which varies the duty to be paid for a licence, according to the circumstance of the auctioneer being admitted a broker or not, and therefore implies that it is not necessary for him to be so admitted, unless he acts as a broker, as distinguished from an auctioneer.

The Court seemed disposed to be of opinion in favour of the Defendant, but they intimated a wish for some precise information, whether before the passing the stat. 17 *Geo.* 3. c. 50, auctioneers were liable to be called upon to be admitted as brokers, and whether in fact the usage was for them to be so admitted.

However, on a subsequent day, before any farther steps were taken, *Adair*, after stating that he had consulted his clients on

(a) This was suggested by the Chief Justice, on the first argument.

the

the subject, moved to discontinue the action, evidently from an apprehension that the judgment of the Court would be against him, and a precedent established unfavourable to the revenues of the corporation of *London*.

Leave to discontinue was accordingly granted, upon an undertaking not to bring any fresh action against the Defendant.

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against
ELLIS.

DA COSTA *against* LEDSTONE.

Thursday,
Nov. 19th.

CLAYTON, Serjt., shewed cause against a rule for judgment as in case of a nonsuit for not proceeding to trial in due time after issue joined. The issue was joined in *Trinity* term, the application therefore he said was premature, and ought not to be made till the third term. *Baker v. Newman, ante, vol. i. 123. Woulfe v. Sholls, ibid. 282.* In some instances indeed, the Court had relaxed the rule, where it appeared that there was time enough for the plaintiff to have proceeded to trial in the same term in which issue was joined. *Frampton v. Payne, ibid. 65.* But here the affidavit was general, that issue was joined in *Trinity* term. Though the plaintiff was too late to give notice of trial in the present term, yet the Court would not anticipate a default which they had refused to do, on a similar application, last term, in another case.

Judgment as in case of a nonsuit for not proceeding to trial, cannot be moved for till the third term after that in which issue is joined; where the affidavit is general, that issue was joined in that term (a).

Le Blanc, Serjt., in support of the rule, relied on the practice, which he contended to be that this motion might be made in the second term. But

The Court, without laying any stress on the affidavit being general (b), said that the practice was now settled, that the Defendant could not apply for judgment as in case of a nonsuit before the third term, and though the Plaintiff was too late to try in this term, they would not punish a default, before it was actually committed. [559]

Rule discharged.

[(a) Vide *ante*, vol. i. p. 65, note (a).]

(b) *Qu.* therefore, whether the former practice of giving judgment as in case of a nonsuit in the second

term, where it appeared that issue was joined early enough in a term to have gone to trial in the same term, be done away by this decision?

1795.

Saturday,
Nov. 21st.

Church-wardens *de facto* may maintain an action against a former church-warden, for money received by him for the use of the parish, though the validity of the election of the Plaintiffs to the office be doubtful, and though they be not the immediate successors of the Defendant.

TURNER and Another *against* BAYNES.

ASSUMPSIT by the churchwardens of the parish of *Stow Market* in *Suffolk*, against a former churchwarden. The usage of the parish had been, for the vicar to choose one churchwarden, and the parishioners the other. But disputes having arisen, both the Plaintiffs were chosen by the parishioners at *Easter* 1794, and continued in office until *Easter* 1795; during which time, *viz.* in *Hilary* term 1795, the action was brought against the Defendant, who had been churchwarden from *Easter* 1790, to *Easter* 1791, and who had admitted a sum of money to be in his hands, on the balance of his accounts at *Easter* 1791, when he went out of office.

The first count of the declaration was, for money had and received *to the use of the Plaintiffs as churchwardens*, and the promise to them as churchwardens. The second for money had and received *to the use of the inhabitants of the said parish of Stow Market*, and the promise to the Plaintiffs as churchwardens. The third on an account stated with the Plaintiffs as churchwardens, of money owing from the Defendant to them as churchwardens, and the promise accordingly. The fourth on an account stated with the Plaintiffs as churchwardens, of money owing from the Defendant *to the inhabitants of the said parish*, and the promise to the Plaintiffs as churchwardens, and the breach was laid *to the damage of the inhabitants of the said parish (a)*.

At the trial before Mr. Justice *Ashhurst* at the last *Suffolk* assizes, the Plaintiffs were nonsuited, chiefly on two grounds, 1st, That they were not duly appointed churchwardens, and 2dly, That they were not the immediate successors of the Defendant in the office.

A rule having been granted to shew cause why the nonsuit should not be set aside, and a new trial granted, *Bond*, Serjt., shewed cause.

It is not sufficient to maintain this action, that the Plaintiffs were churchwardens *de facto*, but they ought to be so *de jure*. Thus it is laid down 4 *Vin. Abr.* 527, *Andrews v. Eagle*, that if there be a churchwarden *de jure* and one *de facto* in the same

(a) See *Cro. Eliz.* 145 and 179. *Hadman v. Ringwood*, 4 *Vin. Abr.* 525. (M. s), *Whitmore v. Bridges*.

parish,

parish, the latter cannot justify the laying out or receiving money, but he is accountable to the former: he is no more than another man, and he that is *de jure* may bring an *indebitatus assumpsit* against the other. Here the custom of the parish being for the vicar to choose one churchwarden, and the parishioners the other, the election of both by the parishioners was clearly illegal, and therefore the Plaintiffs were only churchwardens *de facto*. By the 118th Canon the office of all churchwardens and sidesmen shall be reputed to continue until the new churchwardens who shall succeed them shall be sworn, that is who shall lawfully succeed them. But whether they were duly or unduly elected, they are not entitled to bring the action, not being the immediate successors of the Defendant. It appears from 4 *Vin. Abr.* 530. and 1 *Burn's Ecclesiastical Law*, 381, that the next succeeding churchwardens are to have an action of account against their predecessors. There is no privity except between the predecessors and the immediate successors, and the law will not imply an *assumpsit*, after a party has been so long out of office that several sets of successors have intervened.

Le Blanc, Serjt., on the other side was stopped by the Court, who were very clearly of opinion that the action was maintainable by the Plaintiffs, on both the grounds taken in the argument; that being admitted, and sworn into the office, and acting as churchwardens, the Defendant, who was a wrong-doer in withholding the money, should not be permitted to deny their right to bring the action; and that churchwardens being a corporation for the purpose of taking care of the goods of the church, the right to sue for money withholden from the parish passed from one set to the other, it being perfectly immaterial whether the immediate or any other successors of the Defendant brought an action which was not founded in privity between them.

Rule absolute.

1795.

TURNER
against
BAYNES.

1795.

Tuesday,
Nov. 24th.KINDER and Another *against* PARIS.

To an action brought by the assignees of an insolvent debtor, to recover money owing to him before his insolvency, in which the Plaintiffs declare, that in consideration of the money being due to the insolvent, the Defendant promised to pay it to them as assignees, it is a *bad plea* to say "that the cause of action first accrued to the insolvent before the Plaintiffs became assignees, and that six years had elapsed after the cause of action first accrued to the insolvent, and before the suing out the writ of the Plaintiffs."

Qu. Whether in such case the Defendant

might plead, that the money was first due to the insolvent more than six years before the action was brought, and that he had made no *express promise* to the Plaintiffs within six years (a) ?

Qu. also, Whether in such an action the Plaintiffs must not prove an *express promise* ?

After a party has once amended on a demurrer, the Court will not give him leave to amend again on a second demurrer.

THIS was an action brought under the stat. 33 Geo. 3. c. 5. by the assignees of *Arthur Miller* an insolvent debtor discharged out of the *Fleet* prison, as indorsee of a bill of exchange against the drawer. The first count of the declaration stated the drawing of the bill, the acceptance by the drawee, the indorsement by the payee to *Arthur Miller* before the Plaintiffs became such assignees, the refusal of payment by the acceptor, and the protest for non-payment by *Miller*, of all which premises the Defendant afterwards and before the Plaintiffs became such assignees, had notice. By reason whereof he became liable to pay to the said *Arthur Miller*, &c., and being so liable, and the said sum of money afterwards and when the said *Arthur Miller* was so discharged as aforesaid, and the said Plaintiffs became such assignees as aforesaid, being due and unpaid, the Defendant, in consideration thereof, afterwards and after the Plaintiffs became such assignees as aforesaid, promised to pay them the said sum of money, &c. There was also a count stating that the Defendant was indebted to the Plaintiffs as assignees, for money paid, before the Plaintiffs became assignees, by *Arthur Miller* to the use of the Defendant, in consideration of which the Defendant promised to pay to the Plaintiffs as assignees, &c.: and a similar count stating the debt to the assignees for money had and received by the Defendant, before the Plaintiffs became assignees, to the use of *Arthur Miller*, and a promise to pay to the Plaintiffs as assignees; and the breach was the non-payment to the Plaintiffs as assignees, &c.

Plea after the general issue. "That the said several causes of action in the said declaration mentioned, and each and every of them first accrued to the said *Arthur Miller* before the Plaintiffs became such assignees as in the said declaration is mentioned, to wit, at *London*, &c., and the said Defendant

(a) [The proper plea in this case appears to be that which was first pleaded by the Defendant, *post.* p. 562, note (a) and upon issue joined

on that plea, the Plaintiffs might give evidence of an acknowledgment to themselves, within six years.]

"further

“ further saith, that six years did elapse after the time when
 “ the said several causes of action, and each and every of them
 “ first accrued to the said *Arthur Miller*, and before the day
 “ of suing out of the *original writ of the said Plaintiffs against
 “ the said Defendant, and this,” &c.

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To which plea there was a general demurrer (*a*).

In support of the demurrer *Heywood*, Serjt., argued that the plea was no answer to the declaration.

In all the counts the promise is stated to have been made to the Plaintiffs, and as a breach of promise is the cause of action in assumpsit, no cause of action at all could have accrued to the insolvent. *Non assumpsit infra sex annos* to a bankrupt, is no plea to assumpsit by the assignees, 6 *Mod.* 131, *Parkins v. Woollaston.* 2 *Stra.* 919, *Skinner v. Rebow.* But if the original debt to the insolvent be taken as the cause of action mentioned in the plea, yet there might have been an *express* promise to the Plaintiff, as stated in the declaration, to which allegation there is no answer in the plea.

Le Blanc, Serjt., *contra*, contended that the demurrer admitted that the cause of action accrued to the insolvent, and more than six years before the action brought; an express promise therefore ought not now to be insisted on, when if the par-

(*a*) As the pleadings originally stood, the plea was “ that the Defendant did not undertake and promise in manner and form as the Plaintiffs complained against him, at any time within six years next before the day of suing out the original writ of the said Plaintiffs,” &c.

Replication. “ That at the said several times when the said several causes of action in the said declaration mentioned, accrued to the said Plaintiffs, the said Defendant was in foreign parts beyond the seas, to wit, at *Grenada* in the *West Indies*, and there altogether lived and resided, and continually from thenceforth until he the said Defendant afterwards, to wit, on the 1st day of *June* 1792, returned from beyond the seas unto this kingdom of *England*, to wit, at *London* aforesaid, &c. And the Plaintiffs further said, that within six years next after the return of the said Defendant from beyond the seas

as aforesaid, to wit, on the 1st day of *July* 1794, they the said Plaintiffs did sue out their original writ in this behalf, against the said Defendant,” &c.

Rejoinder, “ That the said several causes of action above mentioned, and each of them first accrued to the said *Arthur Miller*, before the said Plaintiffs became such assignees as aforesaid, to wit, at *London* aforesaid. And the Defendant further said, that six years did elapse after the time when the said several causes of action, and each and every of them, first accrued to the said *Arthur Miller* and before the day of the suing out of the original writ of the said Plaintiffs.”

Special demurrer, “ Because the rejoinder was a departure from the plea, which it clearly was holden to be, and the Defendant had leave to amend.”

ties

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against
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ties had gone to trial, they would have had nothing to rest on but an implied promise, raised on a consideration which is admitted to be within the statute of limitations. If it were allowed the Plaintiffs now to insist on an express promise, they would succeed on demurrer, by supposing an express promise, and at the trial by supposing an implied one, when in fact there was neither, and the Defendant clearly entitled to the benefit of the statute. Instead of demurring, they ought to have replied an *express* (a) promise within six years, on which fact the parties might have gone to trial.

Lord Chief Justice EYRE suggested that the Defendant might have pleaded that the debt was first due to the insolvent more than six years before the action was brought, and that he had made no *express* promise to the Plaintiffs, within six years.

BULLER, J., seemed to think the Plaintiffs must prove an *express* promise at the trial (b).

Le Blanc then prayed to amend, which, as the Defendant had amended once already, was refused.

Judgment for the Plaintiffs.

(a) But *Qu.* Whether this notion of replying that there was an *express* promise, can be reconciled with the technical precision required in framing the language of a record? Every executory agreement is in itself a promise. *Slade's case*, 4 Co. 92 b. Plowd. 182. Yelv. 20. Moore, 667. And when it is said, that in a general *indebitatus assumpsit* the law raises the promise, the true meaning of the phrase is, that from the antecedent debt or duty the law presumes that the Defendant did *in fact* promise to pay, which presumption he can only repel by shewing something in his defence which negatives the duty. That this presumed promise is in contemplation of law a matter of *fact*, appears from the *averment* in the declaration, "that being so in-

"debted, &c. he promised to pay," and also from the form of the general issue *non assumpsit*: and according to Lord Holt, "there is no such thing as a promise *in law*," 6 Mod. 131. If this be so, with what propriety can the record make a distinction between a promise *in fact* and a promise *express*? After stating in the declaration that the Defendant *promised*, would it not be tautology to say in the replication that he *expressly* promised?

(b) [According to the modern cases, an acknowledgment of the debt would be sufficient, and would be evidence of a promise. *Hurst v. Parker*, 1 B. & A. 92. *Pittam v. Foster*, 1 B. & C. 256. *Ward v. Hunter*, 6 Taunt. 211, 2 Saund. 642 (notes), 5th edit.]

1795.

Wednesday,
Nov. 25th.ROULSTON *against* CLARKE and Another.

REPLEVIN for taking the goods of the Plaintiff on the 2d of December 1794. 1. Avowry for a distress for rent arrear, for half a year ending at Michaelmas 1794, under a demise at the annual rent of 130*l.* payable half-yearly. 2. Avowry stated the holding to be under a demise, at the yearly rent of 130*l.* payable, &c. “and also for every acre of the said demised lands and premises in which, &c. which should be ploughed, dug, broke up or converted into tillage, or sown with any corn, grain, clover, or seed or seeds whatsoever, above or more than one-third part thereof, the sum of 3*l.* as an increase of rent payable, &c., over and besides the yearly rent aforesaid, and so proportionably for every greater or lesser quantity than an acre;” and because the Plaintiff had dug up and converted into tillage, &c. thirty-two acres, more than one-third part, &c., by reason whereof 48*l.* of the said increased rent, being at the rate of 3*l.* for each of the said thirty-two acres, became due and payable and were in arrear, avows the taking, &c., for a distress, &c. 3. Avowry was for both rents.

* Pleas in bar to the 1st avowry, *riens arrere*; to the 2d the same; and for further plea, that the Plaintiff did not hold by virtue of any such demise, &c.; and for further plea that he did not break up and convert into tillage more than one-third, &c.

To the 3d avowry, *riens arrere*, and for further plea, that he did not hold, &c. On which pleas issues were joined.

At the trial, which came on at the last assizes at *Warwick*, before Mr. Baron *Hotham*, a lease was given in evidence, dated May 1st 1776, for twenty-one years, reserving a rent of 130*l.* with a covenant to pay for every acre above one-third of the whole which should be ploughed or converted into tillage, *during the three last years* of the said term, 3*l.* as an increase of rent yearly during such three last years, &c., by equal portions, over and besides the yearly rent before reserved, and so proportionably for every greater or less quantity than an acre.—The learned Judge being of opinion, that there was a fatal variance between the avowries and the lease in evidence, with respect to *the last three years of the term*, a verdict was found, under his direction, for the Plaintiff.

An avowry for an increased rent, on a demise, for every acre of the land which should be converted into tillage, is supported by the evidence of a lease for a term of years, with a covenant to pay the increased rent for every acre which should be so converted, during a part of the term, *ex gr.* for the last three years, by the Stat. 11 Geo. 2. c. 19.

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A rule

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ROULSTON
against
CLARKE.

A rule having been granted to shew cause why the verdict should not be set aside and a new trial granted,

Le Blanc, Serjt., shewed cause, and contended that the avowry ought either to have been general under the statute 11 Geo. 2. c. 19, or special, as it must have been at common law; for, prior to the statute, the avowant in replevin was bound to an exact statement of his title *in omnibus*. But in the present case it was neither one nor the other.

But the Court, without hearing the other side, held clearly that the avowries were good, and the variance immaterial, it being sufficient under the statute, which was made to prevent the necessity of setting out strictly a title or demise, to state the general effect and operation of it.

Rule absolute.

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Wednesday,
Nov. 25th.MUILMAN and Another *against* D'EGUINO.

The purchaser of a foreign bill of exchange payable at a certain time after sight, which is publicly offered for negotiation, is not bound to send it by the earliest opportunity to the place of its destination. There is no fixed time when a bill drawn payable at sight or a certain time after, shall be presented

to the drawee. But it must be presented within a *reasonable time*. What is a reasonable time, is a question for the jury to decide, from the circumstances of the case. But *semble* that if the holder of a bill so payable, neither presents it nor puts it in circulation, he is guilty of *laches*, and cannot recover upon it (a). It is sufficient, if notice of a bill drawn in *England* on a person in the *East Indies*, being dishonoured, is sent to *England* by the first *direct* and *regular* mode of conveyance, whether it be by an *English* or a foreign ship: the holder is not bound to send such notice by the accidental, though earlier conveyance of a foreign ship not destined to this country.

(a) [*Goupy v. Harden*, 7 Taunt. 159. 2 Marsh. 454. S. C. *Fry v. Hill*, 7 Taunt. 397.]

thereof

thereof in writing left at their or either of their usual place of abode, pay to the Plaintiffs the full amount of such bill or bills of exchange as should be so returned with protest, &c., then the obligation to be void, &c., which being read, &c., the Defendant pleaded;

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MUILLMAN
against
D'EGUINO.

1. That not any one bill of exchange of any or either of the said five set of bills had been returned and come back to *England*, duly protested, within the true intent and meaning of the condition.

2. That the Defendant had well and truly paid to the Plaintiffs within the time in the condition mentioned, the full amount of such of the said bills as had been returned with protests for non-payment, &c.

3. That by reason of the neglect and default of the Plaintiffs, not any one bill of any of the said five sets was presented or shewn to the said Major *William Palmer* at the house of Messrs. *Palmer and Tucker* at *Calcutta*, or at any other place, *within a reasonable time next after the drawing and indorsing of the same respectively.*

4. The same in the former part as the 3d, with the addition, that by reason of the premises, the Defendant *had not notice so soon as he otherwise would and ought to have had*, that the said Major *William Palmer* would not accept or pay the said bills or any of them.

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5. That all the bills of the said five sets, which were returned and came back to *England* protested for non-payment, *were so returned, and so came back through the default of the Plaintiffs.*

Replication. 1. That one bill of each of the five sets, had been returned and come back to *England*, duly *protested for non-payment, within the true intent and meaning of the condition, concluding to the country.*

2. That the Defendant had not paid to the Plaintiffs within the time in the condition mentioned, the full amount of such of the bills as had been returned with protests, &c., with the same conclusion.

3. That one bill of each set was presented to Major *William Palmer* at the house of *Palmer and Tucker* at *Calcutta*, *within a reasonable time* after the drawing and indorsing, &c. with the same conclusion.

4. That one bill of each set was presented to the said Major *William Palmer*, at the house of *Palmer and Tucker* at *Calcutta*,
within

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within a reasonable time after the drawing and indorsing, *without any default of the Plaintiff*, with the same conclusion.

5. That all the bills of the five sets which were returned and did come back to *England* protested for non-payment, were not so returned, and did not so come back to *England*, through the neglect or default of the Plaintiffs, with the same conclusion.

On these issues a verdict was found at *Guildhall* for the Plaintiffs, the following being the facts of the case. On the 5th of *March* 1793, the bills were drawn by *Goodwin* on *Palmer* in *Calcutta*, in favour of the Defendant, and on the same day indorsed by him for their full value, in a course of negotiation on the Royal Exchange, to the Plaintiffs, who had previously received directions from *Biderman* and Co. of *Paris*, with whom they had a correspondence, to procure bills on *India*. The Plaintiffs then sent advice to *Biderman* and Co. of their having procured the bills, and at the same time drew on *Biderman* and Co. for the amount of them, by way of indemnifying themselves, and requested further orders as to the persons to whom the bills in question should be indorsed. On the 17th of *March* in the same year, *Goodwin* wrote general letters of advice to the drawee, which were sent on board an *East India* ship, which sailed with several others from *Spithead* on the 5th of *April*, and arrived at *Calcutta* early in *September*. On the 19th of *April*, *Goodwin* stopped payment. On the 30th of *April*, four of the bills were indorsed by the Plaintiffs (by the direction of *Biderman* and Co. from whom they had heard in the mean time, and who had paid the bills which the Plaintiffs had drawn on them as an indemnity,) to the order of *Deverin* of *Calcutta*, and the fifth to the order of *Pelon* of the same place, for value in account with *Biderman* and Co. On the 22d of *May* the bills were sent to *India*, by another fleet of *Indiamen*, which sailed on that day, and arrived in the *Huguely* river on the 3d of *October*. On the 5th of *October* the holder of the bills wrote to the drawee, who was not then at *Calcutta*, informing him of the arrival of the bills, and requesting his acceptance of them, which by letter of the 17th of *October* he refused. In consequence of which four of the bills were protested for non-acceptance on the 29th of *October*, and the fifth on the 18th of *November* 1793. Four were protested for non-payment on the 1st of *December* 1793, and the fifth on the 3d of *January* 1794, and were all returned by the first *English* ships which

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which sailed from *India* on the 23d of *February*, and arrived in *England* in *July* 1794. But it also appeared, that the Plaintiffs had received, by the accidental conveyance of a foreign ship not bound to *England*, a letter from their agents at *Calcutta* (with whom the holders of the bills had a constant communication) dated 11th *December* 1793, respecting some other bills, but which was totally silent as to the bills in question.

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A rule having been granted to shew cause why there should not be a new trial, the Lord Chief Justice reported the evidence as above stated, and said, that at the trial, the material questions he had left to the consideration of the jury were, whether the bills were presented to the drawee in reasonable time, which included the question whether they were sent from *England* in reasonable time, and also whether proper notice had been given to the Defendant of their non-payment. That his Lordship was of opinion that there was no rule of law to fix the time when foreign bills should be sent to the place of their destination, and that the Jury were to determine what was reasonable time for that purpose. That under the particular circumstances of this case, he thought the bills had been transmitted in reasonable time to *India*, having been originally put up on the Exchange for negotiation, and therefore liable to be delayed here, and purchased by the plaintiffs as the agents of *Biderman* and Co., who were to give their orders for the disposal of them. As to the time of their being presented in *India* after their arrival in that country, there was no evidence to shew that they were not presented in reasonable time, and it must be always in the discretion of the holder of bills drawn payable at sight, or a certain time after, at what time they should be presented. That with respect to the notice of the bills being dishonoured, it appeared that due notice of that circumstance had been given to the Defendant in this case; for it would be too strict a rule to lay it down that the party in *India* should be bound to send notice to *England*, by the chance conveyance of a foreign ship, and that in this instance notice had been sent by the first regular ships which sailed from *Bengal* to this country.

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Le Blanc, Serjt., in shewing cause, repeated in substance the observations of his Lordship to the Jury.

Adair and *Heywood*, Serjts., on the other hand contended, that due diligence had not been used (which it was necessary in
all

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all cases for the holders of bills of exchange to use) either in sending the bills to *India* by the first ships which sailed from *England* after the indorsement to the Plaintiffs, and which delay was occasioned by their seeking an indemnity for themselves from *Biderman* and Co.; or in presenting the bills in *India* for acceptance, which might and ought to have been done by the holders, without waiting for the drawee's letter of the 17th of *October*, as his residence was known, though he was absent from *Calcutta*; or in returning them as soon as possible to *England*, with due notice of their non-payment, for it was evident that the Plaintiff's agents or the holders of the bills in *India* did not avail themselves of the same opportunity which the foreign ship offered of sending the letter of 11th of *December*, also to send the bills protested for non-payment.

[569] Lord Chief Justice EYRE. The course of the argument in this case does not call upon the Court to lay down any new rule as to bills of exchange payable at sight, or a given time after; if it did, and it were necessary, I should feel great anxiety not to clog the negotiation of bills circumstanced like the present. It would be a very serious and difficult thing to say, that a person buying a foreign bill, in the way that these bills were bought, should be obliged to transmit it by the first opportunity to the place of its destination. There would also be a great difficulty in saying at what time such a bill should be presented for acceptance. The Courts have been very cautious in fixing any time for an inland bill payable at a certain period after sight, to be presented for acceptance, and it seems to me more necessary to be cautious, with respect to a foreign bill payable in that manner. If instead of drawing their foreign bills payable at usances, in the old way, merchants choose for their own convenience to draw them in this manner, and to make the time commence when the holder pleases, I do not see how the courts can lay down any precise rule on the subject. I think indeed that the holder is bound to present the bill in reasonable time, in order that the period may commence from which the payment is to take place. The question, what is reasonable time, must depend on the particular circumstances of the case; and it must always be for the jury to determine, whether any laches is imputable to the Plaintiff. With respect to point of notice of the non-payment being delayed, I think there is no colour for that part of the argument, for I hold

hold that it is sufficient for the party in *India* to send notice by the first regular ships going to *England*, and that he is not bound to accept the uncertain conveyance of a foreign ship.

But upon the whole, my opinion proceeds on the facts of this particular case; I am satisfied with the finding of the Jury; the question whether there had been any laches was left to them, which it was for them to decide, and they have found that no blame was to be imputed to the Plaintiffs.

BULLER, J. This case may be decided on the facts peculiar to itself, without infringing any rule of law. The only rule that I know of, which can be applied to all cases of bills of exchange is, that due diligence must be used. Due diligence is the only thing to be looked at, whether the bill be a foreign or an inland one, and whether it be payable at sight, at so many days after, or in any other manner. And the learning on this point is well laid down by Lord *Mansfield* in *Heylin v. Adamson*, 2 *Burr.* 669. Then the question is, whether due diligence was used by the Plaintiffs in this case? Upon all the facts, the Jury have found that there was no laches in the Plaintiffs, and there is nothing in the state of those facts, as they appear upon the evidence, to warrant the Court to say that the verdict is against law. But here I must observe, that I think a rule may thus far be laid down as to laches, with regard to bills payable at sight or a certain time after sight, namely, that they ought to be put in circulation. If they are circulated, the parties are known to the world and their credit is looked to; and if a bill drawn at three days sight were kept out in that way for a year, I cannot say there would be laches. But if instead of putting it in circulation, the holder were to lock it up for any length of time, I should say that he was guilty of laches. But further than this no rule can be laid down. With respect to the notice, it was clearly sufficient to send it by the ordinary mode of conveyance. I do not say that the party was bound to send the protest by an *English* ship, but it was enough to do so by the first ship, whether *English* or foreign, that was going to *England* in the regular course of conveyance.

HEATH, J., of the same opinion. No rule can be laid down as to the time for presenting bills drawn payable at sight, or a given time after. In the *French Ordinances* of 1673, *Postlethwaite's Dict.* tit. *Bills of Exchange*, it is said, that a bill payable

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able at sight or at will is the same thing: and this agrees with *Marius*.

ROOKE, J., of the same opinion.

Rule discharged.

Thursday,
Nov. 26th.

ROLFE against CASLON.

A. draws a bill of exchange on *B.*, payable to the order of *A.*, which *B.* accepts, and *B.* draws a bill on *A.*, payable to the order of *B.*, which *A.* accepts, for their mutual accommodation. Both bills are payable at the same time, have the same dates, and contain the same sums. One is a good consideration for the other, and neither is an indemnity; so that if either party becomes a bankrupt, the bill accepted by him may be proved under his commission, and consequently, to an action brought on it his bankruptcy may be pleaded (a).

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THIS was an action brought by the drawer of a bill of exchange for 450*l.* payable to his own order, against the acceptor, with the common counts, to which there was the general plea of bankruptcy. A verdict was found for the Plaintiff, with leave to set it aside, if the Court should be of opinion, that under the circumstances of the case the plea could be supported. Those circumstances were, that the Plaintiff and Defendant being desirous to accommodate each other, the Plaintiff drew a bill on the Defendant, payable to his own order, which the Defendant accepted, and the Defendant drew a bill on the Plaintiff payable to *his* own order, which the Plaintiff accepted, the two bills being precisely alike, in the dates, sums of money contained in them, and times of payment, and neither party having effects of the other in his hands.

The Defendant indorsed the bill which the Plaintiff had accepted, to one *Nichols*, in part satisfaction of a debt of 1400*l.*, and twenty days before the bills were due, became a bankrupt. **Nichols* received a dividend upon his whole debt under the commission, and was paid by the Plaintiff the money due on his acceptance, after deducting the amount of the dividend on 450*l.*, the sum for which the bill was drawn. And the only question was, whether the acceptance of the Defendant created a debt, which the Plaintiff could have proved under the commission, that being, of course, the criterion by which the validity of the plea was to be determined.

On behalf of the Plaintiff, *Cockell* and *Marshall*, Serjts., argued in the following manner. It will probably be contended, that the Defendant's acceptance might have been proved under the commission, by virtue of the stat. 7 *Geo.* 1. c. 31. But to bring a bill of exchange within that statute, the credit must appear to have been given upon a good and valuable considera-

(a) [Accord. *Cowley v. Dunlop*, 7 T. R. 565. *Buckler v. Buttivant*, 3 East, 72. But the bills do not create

such a debt as will support a commission of bankrupt, *Sarratt v. Austin*, 4 Taunt. 200.]

tion,

tion, *bonâ fide*, for money due at the time of the bankruptcy, payable *in futuro* at all events, and upon which a discount could be allowed for the time it had to run. Now the Plaintiff in this case could not have proved the Defendant's acceptance under the commission, it being given merely as a counter security; he could not have sworn that a debt was due to him upon that acceptance, till he had paid his own. If it could have been proved, it must have been a debt payable *in futuro at all events*. But suppose no bankruptcy had happened, and the Plaintiff had sued the Defendant upon this acceptance without having paid his own, the Defendant might have shewn that it was an accommodation bill, for which he had no consideration, and this would have been a good defence. So if the Defendant had taken up the bill accepted by the Plaintiff, the action would fail. If then there could be any case, in which the Plaintiff could not have recovered against the Defendant on this acceptance, the consequence is, that it could not be proved under the commission. Now it is evident, that the Plaintiff's claim depended upon the contingency of his being called upon to pay his acceptance, on the failure of the Defendant to take it up. But it is clear law, that a contingent debt cannot be proved under a commission, 2 *Black.* 840, *Young v. Hockley.* 3 *Wils.* 13, *Chilton v. Whiffin.* 3 *Wils.* 528, *Vanderheyden v. De Paiba.* *Dougl.* 165, *Heskuyson v. Woodbridge.* The case *ex parte Maydwell, Cooke's Bankr. Law* 204, is not fully stated, for it appears from the affidavit of the petitioner, that *Prior*, being about to enter into partnership with *Thomas Stevens*, applied to *Maydwell* to lend him 298*l.* 15*s.*, to which *Maydwell* agreed on having two sureties. *Benjamin* and *Thomas Stevens* agreed to become such sureties. On the 8th of November 1784, *Maydwell, Prior, Benjamin* and *Thomas Stevens* met, no other person being present. *Prior* and the two *Stevenses* gave a promissory note to *Maydwell*, by which they promised to pay 203*l.* on the 22d of *January*, and 95*l.* 15*s.* on the 16th of the same month; but no value was expressed to have been received. *Maydwell* then accepted two bills drawn by *Prior*, the one dated the 16th *October* preceding, for 95*l.* 15*s.* at three months, the other the 29th of *October*, at three months, for 203*l.*, so that both those bills became due subsequent to the joint note. Separate commissions issued against *Prior* and *Thomas Stevens.* *Maydwell* paid both his acceptances,

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ances, and then proved 600*l.* under *Prior's* commission, including the two acceptances, and was admitted a creditor for that sum. But when he applied to prove the joint note under *Thomas Stevens's* commission, the commissioners would not permit him to do it, on the ground that *Thomas Stevens* had received no consideration, and that the acceptances, though for the same sums, did not bear the same date, nor become due at the same time, and therefore did not seem to be applicable to the same transaction. To remove the ground of the commissioners' refusal, the affidavit stated that the petitioner had been informed and believed that *Prior* and *Thomas Stevens* had agreed to become partners in the trade of glovers; and to enable them to carry on their business, *Prior* had procured the acceptances to be discounted, and advanced *Stevens* the money. It does not appear, whether any answer was made to this application, or that any of the facts stated in the affidavit were denied. It is probable they were not, because the Chancellor made an order that *Maydwell* might be permitted to prove the note under *Thomas Stevens's* commission. It seems evident that the question never arose, whether the debt was a contingent one, but that the point was, whether *Stevens* had received any consideration for the note.

Le Blanc, Serjt., on the other side, was stopped by the Court, who were very clearly of opinion that the two bills were mutual engagements, constituting on each part a debt, the one being a consideration for the other: that the bill in question was not given as an indemnity, which was in its nature conditional, but created an absolute debt from the beginning, which was capable of being proved under the commission, and being so provable was necessarily barred by the certificate.

Rule absolute to set aside the verdict.

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**Friday,
Nov. 27th.**

ADAM *against* RICHARDS.

**Though on
the sale of a
horse there
is an *express***

Though on the sale of a horse there is an *express* warranty by the seller that the horse is sound, free from vice, &c., yet if it is accompanied with an undertaking on the part of the seller to take the horse again, and pay back the purchase-money, if on *trial* he shall be found to have any of the defects mentioned in the warranty, the buyer must return the horse as soon as he discovers any of those defects, in order to maintain an action on the warranty, unless he has been induced to prolong the trial by any subsequent misrepresentation of the seller. In such case the term *trial* means a *reasonable* trial (a).

(a) [Vide *ante*, vol. i. p. 17. note (a).]

“mish,

“ mish, and in no manner vicious, and that if on trial the said
 “ geldings should have any of the before-mentioned faults, the
 “ Defendant would take them again, and allow the Plaintiff his
 “ purchase-money.”

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At the time of the sale the Defendant gave the Plaintiff a receipt in the following words:—

“ *London, 6th December 1794.*

“ Received of *John William Adam, Esq.* ninety guineas for a
 “ pair of brown bay coach geldings, which I warrant perfectly
 “ sound, free from blemish, and in no manner vicious; and if
 “ on trial they should have any of the before-mentioned faults,
 “ I agree to take these horses again, and allow Mr. *Adam* his
 “ purchase-money.

“ *John Richards.*”

Soon after the sale, it was discovered that one of the horses was vicious and restive in harness, and there was evidence that he was so at the time of the sale: of this the Plaintiff informed the Defendant, but continued to keep the vicious horse for several months, partly at the persuasion of the Defendant, and partly from his own supposition that the horse would improve, and go better as he was more used. The Plaintiff afterwards turned the horse out to grass for some weeks, and then sent him to the Defendant, who supplied another for a temporary purpose, till a better could be procured to match the remaining one of the pair. After this, the Plaintiff took the restive horse again from the Defendant, and returned him the borrowed one, the Defendant saying that the restive horse would then go very well: and it was not till some days after this, namely, on the 23d of *July* 1795, that the Plaintiff finally returned the pair to the Defendant, and demanded back the purchase-money.

On this evidence a verdict having been found for the Defendant, *Bond, Serjt.*, now moved for a new trial, relying on the case of *Fielder v. Starkin, ante* vol. i. 17., to shew that as there was an express warranty, and as the horse appeared to have been restive at the time of the sale, it was not necessary that he should be returned, to make the Defendant liable to an action on the warranty. But the Court said, that though they fully assented to the doctrine laid down in *Fielder v. Starkin*,

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yet where there was an agreement to take a horse back, if on trial he should be found faulty, though it were accompanied with an express warranty, it was incumbent on the purchaser to return the horse as soon as the faults were discovered, unless the seller by any subsequent misrepresentation induced the purchaser to prolong the trial. That a *trial* meant a *reasonable* trial, but here six months had elapsed, after the horse was known to be restive, and before the return. The verdict therefore was proper, and ought not to be set aside.

Rule refused.

Saturday,
Nov. 28th.

WOOD and others, Assignees of LOCKYER and BREAN,
Bankrupts, against WORSLEY.

A policy of insurance against fire under seal, refers to certain proposals distinct from the deed which declare that all persons insured sustaining any loss by fire, shall among other things produce a certificate under the hands of the minister and churchwardens, and some respectable householders of the parish, im-

porting that they are acquainted with the character and circumstances of the persons insured, and know or verily believe that the loss really happened by misfortune, without any fraud or evil practice.

Qu. Whether the production of a certificate, so signed, be a condition precedent to a recovery against the insurers on the policy? Or whether it be not sufficient to shew that a certificate was produced and signed by many reputable householders of the parish, and that the minister and churchwardens being applied to, *without any reasonable or probable cause wrongfully and unjustly refused to sign it?* (a)

(a) [On Error in K. B. the judgment in this case was reversed, that Court holding the production of the certificate to be a condition prece-

dent, and that it was immaterial that the minister, &c. wrongfully refused to sign the certificate, 6 T. R. 710.]

“ or

“ or damage as the nature of the case would admit, and
 “ make proof of the same by their oath or affirmation, and by
 “ their books of accounts, or other proper vouchers, as should
 “ reasonably be required, and should produce a certificate
 “ under the hands of the *minister and churchwardens*, and
 “ of some respectable householders of the parish, not con-
 “ cerned in such loss, importing that they were acquainted
 “ with the character and circumstances of the person or per-
 “ sons insured, and knew or verily believed that he, she or
 “ they really and by misfortune without any kind of fraud
 “ or evil practice, had sustained by such fire the loss and
 “ damage therein mentioned, and in case any difference should
 “ arise between the insured and the Company, touching any
 “ loss or damages, such difference should be submitted to the
 “ judgment and determination of arbitrators indifferently chosen,
 “ &c.” It then went on to aver the interest of the bankrupt
 in the things insured, that the house and goods were consumed
 by fire, together with the books of accounts of the bankrupt,
 that they gave notice forthwith to the Assurance Company at
 their office, and also as particular an account of the loss as the
 nature of the case did admit, and were also ready and willing
 to make, and did tender and offer to make proof of the said
 loss and damage by their oath, and to produce such vouchers
 as could be reasonably required in that behalf, and that he did
 as soon as possible after their loss procure and deliver to the
 said Company at their office a certificate under the hands of
 divers reputable householders, &c. of the parish [naming them]
 importing that the said householders were acquainted with the
 character and circumstances of the bankrupts, and verily be-
 lieved, that they really by misfortune and without any fraud or
 evil practice had sustained the loss, &c., and did as soon as possi-
 ble after the loss *apply to and request the minister and church-*
wardens of the parish [naming them] *to sign such certificates of*
the loss as were required by the printed proposals, that they
 might deliver such certificates to the Company, but the said
minister and churchwardens without any reasonable or probable
cause whatsoever, did wrongfully and unjustly *refuse to sign*
 any such certificate as aforesaid, whereof the Company had no-
 tice. And although a difference arose between the bankrupts
 and the Company after the loss happened, and before the bank-
 ruptcy, touching the said loss, and although the bankrupts al-

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ways after the happening of the said loss, until they became bankrupts, and the Plaintiffs since that time had been ready and willing to submit, and the Plaintiffs since they became assignees had tendered and offered to the said Company to submit the said difference to the judgment and determination of arbitrators, &c. yet the said Company had not paid or satisfied the loss, &c., nor had they submitted the said difference to the judgment and determination of the arbitrators, &c.

The second count was similar to the first, except that it omitted the request to the minister and churchwardens to sign the certificate, and their refusal.

Pleas to the first count. 1. That the bankrupts had no interest in the house and goods consumed, concluding to the country. 2. That the loss happened by fraud and evil practice, concluding to the court. 3. That the minister and churchwardens did not refuse wrongfully, injuriously and without any reasonable and probable cause to sign the certificate, concluding to the country. To the second count there were similar pleas, as to the interest in the things consumed, and as to the loss happening by fraud and evil practice. And farther that the said dwelling-house was situate in the parish of *St. Paul, Covent Garden*, and that neither the bankrupts nor the Plaintiffs had procured any such certificate under the hands of the minister and churchwardens and any reputable inhabitants of the said parish not concerned in the said supposed loss, as is mentioned and required in that behalf, in and by the said printed proposals, &c.

Replication. Issue joined on the five first pleas: and as to the not procuring the certificate, that *Lockyer* and *Bream* did procure and deliver to the said Company, at their said office, such certificate as was mentioned and required by the printed proposals under the hands of divers reputable householders of the said parish, [naming them]; but that the minister and churchwardens wrongfully refused to sign any such certificate without any reasonable or probable cause, &c. concluding to the Court. Rejoinder, denying the last plea. Surrejoinder, joining issue thereon.

A verdict having been found for the Plaintiffs, a rule was granted to shew cause why the judgment should not be arrested; against which, in *Hilary* Term last, *Le Blanc* and *Marshall*, Serjts., shewed cause.

On

On the true construction of the policy, the point to be considered is, whether the production of a certificate signed by the minister and churchwardens was a condition precedent, the performance of which was necessary to enable the Plaintiffs to recover against the insurance office. The question, what words were necessary to make a condition precedent in a contract, was formerly the subject of many nice and subtle distinctions; but it now seems agreed that no technical words are required, and whether any particular set of words make a condition precedent or not, depends on the intent of the parties appearing on the whole of the contract. *Kingston v. Preston*, cited *Dougl.* 688. 8vo. Now it is apparent from the words of the tenth article of the printed proposals, that the framers of it designed to make a distinction between the clause which relates to losses occasioned by foreign invasion or civil commotion, and that which directs the sufferer to produce the certificate. In the former case, they declare the company not liable for the loss in the event there described, in the latter, they begin a new sentence, and without any words of reference to the former clause, merely direct the sufferer to produce the certificate. It is not said that the money shall be payable *on* producing the certificate, or that *until* the certificate be produced, it shall not be payable, as is the case in the proposals of the Sun Fire-Office, from which those in question of the Phoenix Office are evidently taken, except in what relates to the certificate; it seems therefore probable, that the Phoenix Office purposely omitted to make the production of the certificate a strict condition to be performed prior to the recovery of the money, in order to encourage persons to resort to that office in preference to the other. If this were necessary, all the other terms were so likewise, as for instance, notice to the Company at the office in *Lombard Street*, as soon as possible after the loss; but suppose notice not to be given as early as possible, it could not be endured that the office should evade payment merely from that circumstance. In the cases of *Oldman v. Bewicke* (a) and *Routledge*

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(a) *Oldman* and another, Assignees of *Ingram* a Bankrupt, v. *Bewicke* and Others. In *C. B. Michaelmas*, 26 *Geo.* 3.

THIS was an action against the Directors of the Sun Fire-Office, upon a policy of insurance against fire: the declaration among other things stated the 10th proposal to have been as follows: *viz.* "Persons sustaining any loss or damage by fire, are forthwith to give notice thereof at the office,
" and

1795. *Routledge v. Burrell* (a) which arose on actions against the Sun Fire-Office, it was expressly provided that the money should

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“ and as soon as possible afterwards, to deliver in as particular an account of
 “ their loss and damage as the nature of the case will admit of, and make
 “ proof of the same by their oath or affirmation, (according to the form
 “ practised in the said office,) and by their books of account, and such other
 “ proper vouchers, as shall be reasonably required, and *procure a certificate*
 “ *under the hands of the minister and churchwardens, together with some other*
 “ *reputable inhabitants of the parish not concerned in such loss, importing*
 “ *that they were well acquainted with the character and circumstances of the*
 “ *person or persons insured, and do know or verily believe that he, she or*
 “ *they really and by misfortune, without any fraud or evil practice, have sus-*
 “ *tained by such fire the loss and damage as his, her or their loss, to the value*
 “ *therein mentioned, but till such affidavit and certificate of such insured's*
 “ *loss shall be made and produced, the loss money shall not be payable ; and if*
 “ *there appears any fraud or false swearing, such sufferers shall be excluded*
 “ *from all benefit by their policies, &c.*” It then stated, that the bankrupt
 did forthwith give notice of his loss to the society, at their said office, and as
 soon as possible afterwards did there deliver in as particular an account of
 his said loss and damage as the nature of the case would admit of, and did
 make proof of the same by his oath or affidavit in writing, according to the
 form practised in the said office, and by such other proper vouchers, as were
 reasonably required ; and further, that the minister of the parish of *Portea*,
 in which, &c., long before, and at the time of the loss dwelt and resided at a
 distance from and out of the said parish, and was wholly unacquainted with
 the character and circumstances of the said *Ingram*, and wholly unable to
 make such certificate, as by the said policy was required. But that the said
Ingram (afterwards, &c.,) did procure and deliver to the said office, a certi-
 ficate under the hands of *William Thomas*, &c. then and at the time of the said
 loss being reputable inhabitants of the said parish, who were not concerned in
 the said loss, importing, &c. The Defendants pleaded, First, That the pre-
 mises were wilfully set on fire, and burnt down by the bankrupt. Secondly,
 That at the time of the supposed loss the bankrupt had no interest in the
 premises, but no notice was taken of the certificate required, or the want of
 it, in any of the pleadings, except in the declaration as above set forth. But
 issues being joined upon both pleas the cause went in that state to trial, and
 the jury found a verdict for Plaintiffs, damages 300*l.* the demand being for
 1500*l.* the amount of the insurance.

A rule having been granted to shew cause why the judgment should not be
 arrested, on the ground that the title of the Plaintiffs to recover was not set
 forth in the declaration, inasmuch as it did not thereby appear that the cer-
 tificate required had been procured and produced, on shewing cause the ar-
 guments were as follow :

Against the rule it was said that the motion was grounded either on the
 title being defective, or defectively set forth. The latter objection was cured
 by the verdict, and the former waived by the defence set up in the pleas. It

(a) *Ante*, vol. i. p. 254.

should *not be paid till the certificate was produced, which makes those cases essentially different from the present. It

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is stated in the declaration that the minister lived at a distance out of the parish, and though nothing is said about the churchwardens not signing the certificate, yet it appears that many of the principal and respectable inhabitants have signed it. This is not an absolute preliminary title. Many places are not parishes; and livings may be vacant when fires happen. Here the Plaintiffs have done as much as they could; it is not denied that the persons who signed were respectable inhabitants. Matter may be supplied by intendment after verdict, Sir *T. Raym.* 487. Sir *T. Jones*, 232. So a defect in the declaration may be waived by pleading, as in *Stra.* 925. *The Bishop of London v. The Mercers' Company*, in *quare impedit* the Plaintiffs had not shewn sufficiently that the next turn belonged to them, there the Defendant might have taken advantage of the defect, but it was cured by pleading over. If a party takes material issues, and they are found against him, he shall not, after putting the Plaintiff to great expense, arrest the judgment. Any person may waive a benefit introduced for himself. Here material issues are taken; first, that the house was wilfully set on fire by the bankrupt; secondly, that he had no interest. The objection now made would justify the office in refusing to pay in all cases. The Plaintiff has shewn that he has conformed in all things as far as he was able, and the verdict of the jury has ascertained all that was to be expected from the certificate.

In support of the rule, it was argued, that the issues admitted only what was well and specially averred. Neither of them have a reference to the certificate.

Nor is the objection of the defective title waived by the pleas. It could not be taken by a traverse of any averment in the declaration. It must have been by pleading it specially; but this was unnecessary if the declaration be radically defective.

LORD LOUGHBOROUGH.—Though I am satisfied the verdict was right, that the fire was accidental, and that the certificate could not have been procured, because the bankrupt had not sustained all the loss he claimed, yet the rule of intendment after verdict cannot be applied where there is an absolute defect of title, as there is in this case. As to the pleas, they are wholly collateral to the title.

GOULD, J. Till the affidavit is made, and the certificate procured, the money is not to be payable: the time of payment therefore is not yet come. Though a person were a *bonâ fide* sufferer, still he is not intitled without a certificate. The stipulation is a condition precedent, that there shall be a certificate that there is no kind of fraud. Nothing is said about the churchwardens: and the excuse of the minister living at a distance is frivolous.

NARES, J.—I have had no doubt since the case was first mentioned to the Court. The stipulation is, that the office will in no case be liable, unless such certificate be produced. The Plaintiff therefore ought to aver the performance of the stipulation. There is no pretence to say that this objection is waived by the pleas.

Judgment arrested.

appears

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appears therefore that the production of the certificate in this case was merely directory, and not a condition precedent; it was rather a matter of fairness between the parties, than of legal obligation. If then this were not a condition precedent, no averment of performance was necessary in the declaration, and when no such averment is necessary, a defective averment of performance, and consequently a defective excuse for non-performance, will not vitiate. 1 *Lev.* 293, *Beany v. Turner*.

But supposing the Court should be of opinion that it was a condition precedent, the defect is cured, either by the excuse alleged for the non-performance of it, by the subsequent pleadings, or by the verdict. If it be a condition precedent, it is not that sort of condition, the performance of which makes the very consideration of the contract, but only a *matter subsequent*, the non-performance of which is to defeat *an inchoate right of action*, which vests in the insured by the loss happening. The non-performance therefore of such a condition is matter of defence to the action. 1 *Term Rep. B. R.* 638. *Hotham v. The East India Company*. But every ground of defence set up by the Defendant has failed. He has denied in his plea the truth of the facts alleged as an excuse for not procuring the certificate, which is an admission of the goodness of the excuse, supposing the facts to be true; and after the Jury have found them to be true, he shall not be permitted to say that they are no excuse. It appears upon the record, that the minister and churchwardens *wrongfully* and *unjustly*, without any reasonable or probable cause, refused to sign the certificate. But in a court of law nothing can be deemed *wrongful* or *unjust* but that which is so in a legal sense. Now suppose that the minister and churchwardens had said "this certificate may be true or false for any thing we know; but be that as it may, we are no parties to your contract, we are not bound to inquire into the truth or falsehood of your certificate, therefore we will have nothing to do with it;" this would be neither *wrongful* nor *unjust*, nor would it be a good excuse for the not procuring the certificate. It must therefore be understood after verdict that the refusal was wrongful and unjust in the sense that makes it a good excuse for not procuring the certificate, namely, by the interference of the Defendant: and in no other sense can it now be understood to be wrongful and unjust. But a title defectively set forth is helped by a verdict, and upon the same principle,

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principle, an excuse for the non-performance of a condition precedent defectively stated is also helped by a verdict. If therefore the excuse in the present instance be ambiguous as to the import of the terms *wrongful* and *unjust*, it is cured by the finding of the jury : and every thing doubtful is construed so as to support a verdict. 1 *Salk.* 29, *Roe v. Haugh* ; 2 *Burr.* 899, *Collins v. Gibbs* ; 2 *Ld. Raym.* 810, *East v. Essington* ; 1 *Wils.* 115, *Alcorn v. Westbrooke*.

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Adair, Bond, and Cockell, Serjts. contra. The production of the certificate according to the printed articles, was a condition precedent, and therefore necessary to be performed to entitle the Plaintiffs to recover. This was decided in *Oldman v. Bewicke*, and *Routledge v. Burrel*, in which cases the Court did not lay any particular stress on the insertion of the words that “ till the certificate should be produced, the loss money should not be payable.” Though those words are omitted in the present policy, the law will imply that condition. The articles can have no effect, except as conditions precedent. It is declared, that the Company shall only be liable according to the printed proposals. They cannot therefore be rejected ; and if they are admitted, they can be nothing but conditions precedent. If the Plaintiffs can recover without the certificate, they may also recover without an affidavit or notice, and without doing any other thing which the proposals required to be done. If then it were a condition precedent, nothing can excuse the non-performance of it, but some act of the party for whose benefit it was designed. *Co. Litt.* 206 *b.* It is expressly stated on the record that the condition was not performed, and the reason is given for the non-performance. There is no room therefore for intendment ; the title is itself defective, and not merely defectively set forth, and therefore it is not cured by the verdict. 4 *Term Rep. B. R.* 470. *Bishop v. Hayward*. In *Hotham v. The East India Company*, the non-performance of the condition was owing to the Defendants themselves, their factors and agents, which makes that case materially different from this. But the case of *Davis v. Mure* there cited p. 642, and in which the inquiry by a court-martial was a condition precedent, is an express authority in favour of the Defendant. “ The dependence or independence of covenants,” (to use Lord *Mansfield*’s words in *Kingston v. Preston*,) “ is to be collected from the evident sense and meaning of the parties, and however trans-
“ posed

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“posed they might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance.” And this doctrine is confirmed by *Ashhurst, J.*, in *Hotham v. The East India Company*. As to *Collins v. Gibbs*, that case shews that performance of what the Plaintiff was to do on his part, must be averred. The performance of a condition precedent is traversable, and therefore material to be alleged. *Nay, 75. Cro. Eliz. 889. 9 Co. 9 b, Ughtred's case*. And he who undertakes for the act of another, undertakes that it shall be done at all events. *5 Co. 28 b. Lamb's case. 1 Roll. Abr. 452.*

From what passed after the argument upon the bench, it seemed as if the Chief Justice, Mr. J. *Buller*, and Mr. J. *Rooke* thought, that supposing the printed proposals to be conditions precedent, there had been a performance *cy pres*, but that in truth the policy being a commercial contract was to be construed liberally, and the true question was, Whether the loss had fairly been incurred? If it had, (and it appeared on the record to have so happened,) the refusal of the minister and churchwardens was without good cause, and therefore the Plaintiffs were intitled to maintain their action. But Mr. J. *Heath* appeared to differ from the rest of the Court, and time was taken to consider.

[582] And on this day, the cause having stood over from last *Hilary* term, the Lord Chief Justice said, that as a difference in opinion prevailed among the Judges, and as they were informed that a writ of error would be brought at all events, whichever way the judgment was given, they thought it unnecessary to discuss the question any farther. Judgment therefore was ordered to be entered for the Plaintiff, *pro formá*, merely that the writ of error might proceed.

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MARSH, Knt. and Others *against* FAWCETT, Clerk.Saturday,
Nov. 28th.

IN *August* 1794, a *levari facias de bonis ecclesiasticis* issued to the Bishop of *Winchester*, at the suit of the Plaintiffs, against the Defendant, returnable in fifteen days of *St. Martin*, and indorsed to levy 125*l.* (being the arrears of two annuities, to secure which judgment had been entered on a bond), on which a sequestration issued. On the 25th of *April* following, the Bishop was called upon by rule of Court to return the writ, which he accordingly did, stating “that the Defendant was a “beneficed clerk and vicar of the parish and parish church of “*Milford* in his diocese, that he had caused to be levied of the “fruits, tithes, &c., which had arisen or accrued thereupon “since the delivery of the writ, the sum of 14*l.* 18*s.* 10½*d.*, of “which he had retained 4*l.* 19*s.* 3¼*d.* for tenths and land-tax, “and 3*l.* 6*s.* for the costs of the levy, and had caused the residue to be paid to the Plaintiff’s attorney in satisfaction of “their debt and damages: and certified that since the delivery “of the writ to him there had not been, arisen, or accrued any “further fruits, tithes, profits, &c., from the said parish or “parish church of *Milford*, nor had the Defendant any other “ecclesiastical goods within his diocese, whereof he could cause “the residue of the said debt and damages, or any part thereof, to be levied.”

Between the 25th of *November* the return day of the writ, and the 25th of *April*, the sequestrator had received a much larger sum from the profits of the living, which after certain deductions remained in his hands, and which, together with the sum before levied, amounted nearly to 125*l.* the sum indorsed, and several other writs of *levari facias* had been delivered to the Bishop at the suit of other Plaintiffs against the Defendant, some before the return day of the first writ, and some after.

A rule having been granted to shew cause why the Bishop and his sequestrator should not proceed to levy the Plaintiff’s debt out of the growing profits of the vicarage, and why the writ and return should not be taken off the file, and the writ be

Though a *levari facias de bonis ecclesiasticis* is a continuing execution, and a levy may be made under it from time to time *after* it is *returnable* till the sum indorsed be satisfied, yet if it be *actually returned*, the authority of the Bishop is at an end.

Therefore where such a writ remained in the hands of the Bishop long after it was returnable, who sequestered the profits of a vicarage accruing as well before the return day as after, and being ruled to return the writ, returned only the amount of the sum levied up to the *return day*, the court would not order the writ and return to be taken off the file, but would only permit the return to be

amended by inserting the sum levied, up to the time when the writ was *actually returned* (a). [The proper way to proceed is to rule the Bishop from time to time to know what he has levied.]

(a) [Vide *Arbuckle v. Cowtan*, 3 Bos. & Pul. 327.]

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amended by indorsing on it to be levied, the sum of money *then actually due* to the Plaintiffs,

Adair, Le Blanc, and Cockell, Serjts., shewed cause, on the part of the Bishop and the other creditors, contending, that after the writ was actually returned, the Bishop's authority to levy, and consequently that of the sequestrator, was at an end, and therefore that as to the growing profits of the vicarage, the Plaintiffs had lost their priority, and must now be postponed to the other creditors who had sued out their writs.

Bond, Serjt., in support of the rule. The writ of *levari facias* is a continuing execution, and the officer of the Bishop must take care that all the profits of the living sequestered be applied to satisfy the sum due to the Plaintiff in the writ first delivered to him, in preference to any other. If the sequestration issues, and is published before the writ is returnable, it is sufficient, and the Plaintiff is intitled to the growing profits from time to time, though long after it is returnable, until he is satisfied. *Legassicke, Executor of Adams, v. The Bishop of Exeter*, 1 *Crompt. Pract.* 359. (a).

Per Cur. This is certainly in its nature a continuing execution (b), unless the Plaintiff takes away the authority under which the sequestration issues, by calling generally for a return of the writ. The mistake here was in calling for that return. The proper way would have been to have ruled the Bishop from time to time, to know what he had levied. All that can be done now is, to amend the return, by inserting the amount of the whole sum received under the sequestration, up to the 25th April.

The rule was made absolute, not to take the writ off the file, but for the Bishop to amend the return by stating the amount of the sum levied up to the time when the return was actually made.

(a) See also 3 Burn. Eccl. Law, 322, 8vo.

(b) If the writ was not returned, the execution would undoubtedly continue until the sum indorsed was satisfied. But *Qu.* whether the Plaintiff could, after that sum was levied, preserve his priority, with regard to the future arrears of the annuity, over another judgment creditor, who might have delivered another writ to the bishop, in the interval after the sum indorsed on the former writ was levied, and before the

time of the next periodical payment arrived? The equitable interposition of the Court seems hitherto to have extended no further, in cases of judgments entered on bonds to secure annuities, than to permit the judgment to stand as a security for the future payments, and fresh executions to be taken out as those payments became due, without a suggestion or *scire facias* under the stat. 8 & 9 W. 3. c. 11. *Howell v. Hanforth*, 2 Black. 843. 1016. *Ogilvie v. Foley*, *ib.* 1111. *Scott v. Whalley*, *ante*, vol. 1. p. 297.

Le Blanc

Le Blanc referred to *Rast. Entr. 37*, for the form of a *levari facias de bonis ecclesiasticis* to levy the arrears of an annuity on a writ of annuity, and the Bishop's return.

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DILLON against LEMAN and Another.

THIS case, which was sent from the Court of Chancery for the opinion of this court, stated that *William Naunton*, being in his lifetime seised in fee-simple of the lands in question in the said cause, died so seised thereof in the month of *August 1758*, leaving *Mary Dillon* mother of the said Plaintiff *John Talbot Dillon*, then the wife of *Francis Dillon*, his heir. Upon the death of the said *William Naunton*, *William Leman* entered into the said lands, and became tortiously seised thereof, and being so seised, in *Hilary Term 1765* levied a fine *sur cognizance de droit come ceo* of the said lands, whereupon proclamations were duly had, according to the form of the statute in such case provided, the said *Mary Dillon* being under coverture with the said *Francis Dillon*, at the time of the levying such fine. On the 20th of *February 1765*, the said *Mary Dillon* died under coverture of the said *Francis Dillon*, as aforesaid, leaving the said *John Talbot Dillon* then of the age of twenty-one years, of sound mind, out of prison, and within this realm, her son and heir. No entry or claim was made on or to the said lands by or on behalf of the said *Francis Dillon* or *Mary Dillon* in her lifetime, nor at any time afterwards by the said *Francis Dillon*, nor by the said *John Talbot Dillon* until the year 1787, when he made an entry to avoid the said fine. And the question was, Whether on the above case, the said *John Talbot Dillon* was barred by the said fine from recovering the said lands?

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Nov. 28th.

A. seised in fee of lands dies leaving *B.* his heir, a feme-covert. Upon his death a stranger makes a tortious entry on the lands, continues in possession, and levies a fine *sur cognizance de droit come ceo* with proclamations. *B.* afterwards dies under coverture, no entry having been made, on her behalf to avoid the fine, leaving *C.* her heir of the age of twenty-one, of sound mind, out of prison, and within the realm. The fine is a bar to the right of *C.*, unless he make his claim within five years after the death of *B.*

This was first argued in *Hilary Term 34 Geo. 3.* by *Le Blanc*, Serjt., on the negative, and *Lawrence*, Serjt. on the affirmative, and a second time in *Trinity Term* following by *Bond*, Serjt., on the negative, and *Adair*, Serjt., on the affirmative.

On the negative side of the question, the arguments were in substance the following. The Plaintiff *John Talbot Dillon* was not barred by the fine, being the heir of *Mary Dillon*, who was under the disability of coverture at the time when it was levied, and died under that disability. This is not a case within the stat. 4 *Hen. 7. c. 24.* Persons under disabilities

1795. titles are by express words excepted out of the body of the statute, which works the bar, and are not brought within it by any subsequent clause, except in case of the removal of the disability: the case of dying under a disability is not provided for. The statute enacts, that a fine with proclamations duly made shall "conclude as well privies as strangers to the same, *except* women covert (other than be parties to the said fine) and every person then being within the age of twenty-one years in prison, or out of this realm, or not of whole mind at the time of the said fine levied, not parties to such fine." Then follow the savings, which are, 1st. of rights, &c. which exist at the time of the fine engrossed to all persons not parties to the fine, if they pursue their claim within five years: 2d. of those which may accrue after the fine engrossed and proclamations made, by virtue of any gift, &c. made before the fine levied, with the same limitation as to the five years: 3d. of those which accrue to persons under disabilities at the time of their accruing, provided they pursue their rights within five years after their disabilities are removed. The fourth saving ordains, that all persons not parties to the fine, who are under the disabilities specified at the time of the fine engrossed and proclamations made, and before excepted in the act, having right, title or cause of action to the lands, &c. and *their heirs* shall take their said actions or lawful entry within five years after the disabilities are removed: and that if they do not take their action and entry as is aforesaid, they and their heirs shall be for ever concluded in the same manner as parties and privies. Now it is obvious that the word *heirs* in this clause means the heirs of persons who die after the removal of their disabilities, when the five years have began to run, and not the heirs of those who *die under disabilities*, as in the present case. It is plain therefore that *Mary Dillon*, the mother of the Plaintiff, who was a feme-covert at the time of the fine levied, and neither a party nor privy to it, was within the exception of the statute, and having died during coverture, that she was never in a situation capable of being brought within the operation of the statute. A condition subsequent becoming impossible by the act of God, is void. *Co. Litt. 260 a.* And this omission in the statute to limit the heir of a person dying under a disability to any period in which he shall bring his action, must be taken to have been designed by the legislature.

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lature. That statute was the result of long experience. The stat. 18 *Ed.* 1. *st.* 4. declares that by the common law a fine concluded not only parties and privies, but all other persons being of full age, out of prison, of good memory, and within the four seas, if they made not their claim within a year and a day, leaving those who were under the disabilities alluded to an indefinite time to make their claim in, after the disabilities were removed. The 34 *Ed.* 3. *c.* 16. simply took away the doctrine of non-claim, which was restored by 1 *Ric.* 3. *c.* 7. and that statute was followed by 4 *Hen.* 7. *c.* 14. which at length was passed to settle the law upon the subject. In other statutes of limitation, the death of the disabled person is mentioned. Thus by the 21 *Jac.* 1. *c.* 16. *s.* 1. the time for bringing a formedon is limited to twenty years after the title accrues, with a saving in the second section of the rights of persons under the age of twenty-one, feme-coverts, insane, imprisoned, or beyond seas, provided they or their heirs shall within ten years after their full age, discoveriture, coming of sound mind, enlargement out of prison, or coming within this realm, or death, take benefit of and set forth the same. So also by 10 & 11 *W.* 3. *c.* 14. the time for bringing a writ of error to reverse a fine or recovery, is confined to twenty years, with a similar provision that a person under the disabilities mentioned, shall bring his writ of error within five years after the removal of those disabilities, and his heirs, executors, and administrators within the same period after his death. But independent of these arguments from comparison and analogy, the authority of Lord *Coke* commenting on the stat. 4 *Hen.* 7. is positive, that the heir of a person whose disability is not removed, may enforce his claim at any time, notwithstanding the fine; for it is laid down in *Cotton's case*, *Stille v. Howes*, 2 *Inst.* 519. “For that persons out of the realm
“at the time of the fine levied, amongst others, having a present right, are excepted out of the body of the act which
“worketh the bar; therefore he that is beyond sea at the time
“of the fine levied, and never returns, is within the exception
“out of the body of the act, and he and his heirs may enter
“and take his action at any time; but in case he doth return,
“he and his heirs must enter and take his action within five
“years after his return: and so it is of an infant being party to
“the fine and having a present right, if he dieth during his
“infancy,

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“ infancy, he or his heirs may enter or take his action at any
 “ time: and so it is of a person that is *non compos mentis* by
 “ the act of God, if he die while he is *non compos mentis*; or a
 “ man in prison, which is by act in law, if he die in prison;
 “ or a *feme-covert*, which is by her own act, *if she die while she*
 “ *is covert*, being no parties to the fine.” And the same doc-
 trine is to be found in *Beverley’s case*, 4 Co. 125 b. *Jenk. 4*
Cent. 192. 13 Vin. Abr. 286. If the opinion of *Anderson*, as
 it appears in the report of *Cotton’s case*, 1 Leon. 211. be cited
 on the other side, it is to be observed that it was merely thrown
 out by the way, and not called for by the facts of the case then
 before the Court.

On the part of the Defendants the result of the arguments
 was, that as a fine was an assurance to secure the title and
 peaceable possession of lands to the owner, and as the object
 of the stat. 4 Hen. 7. was to confirm the revival of the doctrine
 of non-claim, that statute ought to be construed according to
 the intention of the makers of it, which evidently was, that a
 fine should be a complete bar to all rights, which were not pur-
 sued within five years after they had accrued. That the word
heirs in the sixth section, must be taken to include heirs of per-
 sons dying under disabilities according to the true scope and
 meaning of the statute, and that this interpretation was agree-
 able to the rules and principles of construction laid down by
Brooke, J., Plowd. 178, Hill v. Grange; Plowd. 366. Stowel v.
Lord Zouch; Cro. Car. 200, Hulm v. Heylock; 1 Leon. 211.
Cotton’s case. That if the contrary construction were to pre-
 vail, the heir must have an indefinite time to claim in, and
 consequently the security of property would be materially af-
 fected.

On this day, the Lord Ch. J. declared shortly the opinion of
 the Court, that the exception in the first branch of the statute
 4 Hen. 7. and the proviso at the end of it were to be taken to-
 gether; that being so taken, they did not amount so much to
 an exception as a saving, the true meaning of which was, that
 the rights of those persons who were under disabilities and of
 their heirs, were saved as long as the disabilities continued, and
 five years after, but no longer; therefore that the heir not being
 himself disabled, was barred unless he pursued his right within
 the five years after it accrued by the death of his ancestor
 dying under a disability; and consequently, that the Plaintiff
 in

in this case was prevented by the fine from recovering the lands in question (a). And to this effect was the certificate sent to the Court of Chancery.

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against
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(a) See Cruise on Fines, 231. 2d edit.

DENNIE *against* ELLIOTT, HILL and Another.

Saturday,
Nov. 28th.

IN this case a rule was granted to shew cause why execution for the damages and costs recovered by the Plaintiff in this cause, amounting to the sum of 52*l.*, should not be stayed, the Defendant **Hill* undertaking to stay all proceedings on the judgment by him obtained in another action brought by the Plaintiff, wherein *Hill* had his costs taxed at the sum of 43*l.* 19*s.* 3*d.* and also undertaking to pay to the Plaintiff or his attorney the sum of 8*l.* 9*d.*, being the balance due to the Plaintiff after setting off the costs so due to the Defendant *Hill* from the Plaintiff, on an affidavit by *Hill*, that the Plaintiff appeared to be insolvent, that his goods were all distrained for rent, and that he himself was not to be met with.

The Court will allow the costs recovered by *A.* against *B.* in one action, to be set off and deducted from the damages and costs recovered by *B.* against *A.*, *C.*, and *E.* in another action, notwithstanding the attorney of *B.* swears that he believes *B.* to be insolvent, and that there is no fund out of which the attorney's costs can be paid, but the damages and costs so recovered by *B.* (a).

In opposition to the rule, *Le Blanc*, Serjt., produced an affidavit of the Plaintiff, stating that *Hill* had told him that *Elliott*, one of the other Defendants, was to indemnify *Hill*, as having acted under his orders, and that the Plaintiff had offered not to take out execution against *Hill*. The attorney for the Plaintiff also made an affidavit that he had no security for his costs, which the Plaintiff was unable to pay, and which he verily believed he should lose, if the set-off were allowed, as he had no chance of recovering them, but out of the damages and costs to be received under the judgment for the Plaintiff.

Le Blanc also relied on the practice of the Court of King's Bench, and cited *Mitchell v. Oldfield*, 4 Term Rep. B. R. 123. and *Randle v. Fuller*, 6 Term Rep. B. R. 456.

In support of the rule *Bond*, Serjt., insisted on the known practice in this Court, that the attorney's lien for his costs was subject to the equitable claims of the parties in the cause, which he said was settled in the cases of *Schoole v. Noble*, ante, vol. 1. 23., *Nunes v. Modigliani*, 217., *O'Connor v. Murphy*, 657., and *Vaughan v. Davies*, vol. 2. 440.

(a) [Vide ante, vol. 1. p. 23. n. (b).]

END OF MICHAELMAS TERM.

C A S E S

ARGUED AND DETERMINED

1796.

IN THE

Courts of COMMON PLEAS

AND

EXCHEQUER CHAMBER,

IN

Hilary Term,

In the Thirty-sixth Year of the Reign of GEORGE III.

FORD, One, &c. *against* MAXWELL, One, &c. (a).

Monday,
Feb. 1st.

IN this action, which was brought by one attorney against another for his fees, the Plaintiff recovered a verdict, though it was objected at the trial that he had not left his bill signed by him with the Defendant, pursuant to the stat. 2 Geo. 2. c. 23. s. 23. which, it was contended, he ought to have done, notwithstanding the Defendant was himself an attorney at the time of the action brought, all the business having been done by the Plaintiff before the Defendant was admitted as an attorney, and the stat. 12 Geo. 2. c. 13. s. 6. extending, as it was said, only to the case of both parties being attornies or solicitors at the time when the debt was contracted; the words of that section being, that the 2 Geo. 2. c. 23. “shall not extend to any bill
“of fees, charges and disbursements, that are now, or shall
“hereafter become due from any attorney or solicitor to any
“other attorney or solicitor, &c.” And now *Cockell*, Serjt., moved for a new trial, repeating the objection which had been over-ruled at the trial.

To maintain an action by one attorney against another, for business done by the Plaintiff for the Defendant *before* the Defendant became an attorney, it is not necessary for the Plaintiff to leave his bill signed with the Defendant, according to the directions of 2 Geo. 2. c. 23. s. 23., the 12 Geo. 2. c. 13. ap-

plying to the case of both parties being attornies when the action is brought.

(a) [1 Esp. N. P. C. 420. S. C. Tidd, 333. 8th ed.]

s s 2

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But the Court held, that though the literal construction of the stat. 12 Geo. 2. c. 13. might be as the Defendant alleged, yet the * object and spirit of it was, that the restrictions of the 2 Geo. 2. c. 23. should not be applied where both parties were attornies when the action was brought, for in such case the Defendant must be taken to be fully competent to understand the nature of the charges in the bill, and to resist them if exorbitant or improper.

Rule refused.

Monday,
Feb. 1st.

BENJAMIN *against* PORTEUS.

A person who is employed to sell goods, and is to have for himself whatever money he can procure for them beyond a stated sum, is a competent witness to prove the contract between the seller and the buyer (a).

IN this action for goods bargained and sold, brought to recover the price of a quantity of indigo, which was sold for three shillings a pound weight, one *Bennett*, the broker who was employed by the Plaintiff was called as a witness to prove the contract, and being examined on the *voir dire*, stated that by his agreement with the Plaintiff he was to have for his own profit whatever sum he could get for the indigo above half-a-crown for the pound, which price the Plaintiff had fixed for himself, but not an allowance of so much *per cent.* on the sale by way of commission in the usual way. The Lord Chief Justice at the trial thought this was an objection to the competence of the witness on the score of interest, and that as he did not come within the description of a broker or factor, the exception to the general rule made in favour of their testimony being admissible to prove contracts made by them was not applicable to him, and as he refused to release, the Plaintiff was in consequence nonsuited.

Cockell, Serjt., now shewed cause against a new trial. The evidence of *Bennett* was properly rejected, as he was to have a profit on the sale, not as a broker, but as a partner: for whatever sum the goods might be sold above half-a-crown for a pound, he was to have the whole, independent of his employer. He had therefore a direct interest in establishing the contract, and is not included in any of the excepted cases of interested witnesses. In *Dixon v. Cooper*, 3 Wils. 40. the factor was merely an agent for both parties, and was to receive a certain sum at whatever price the goods might sell; but here the wit-

(a) [See the cases cited in note (a), *ante*, p. 225.]

ness had a separate interest of his own, and was only agent for the Plaintiff, and that no farther than to a given extent. In *Baker v. Bent*, 3 Term Rep. B. R. 27, the broker discharged his duty as agent for both parties before he underwrote the policy, which, it was properly holden in that case, should not deprive the parties of the benefit of his testimony. The true line is there marked, which is whether the witness is to gain or lose by the event of the cause.

Adair, Serjt., for the rule. The witness was nothing like a partner, as there was no communion of profit and loss between him and his employer; but he was most indisputably a broker, who may be defined to be a person who makes a bargain between two or more other persons. There is no other definition of the term broker, unless it be where the law appoints brokers for special purposes. Now every broker and factor is interested to establish the contract he makes, as well as to increase the price, for the value of his commission will be increased in proportion. But exceptions to the rule which excludes the testimony of interested witnesses, are admitted in the case of a factor or broker; the broker therefore in the present case was clearly intitled to the benefit of the exception. In a question of competence, the quantity of interest makes no difference. Therefore as a direct interest is no objection to the competence of a factor or broker, the quantity of it goes to his credit with the jury. In *Baker v. Bent* the broker who had underwritten the policy, was directly interested in the event of the cause; it was a consolidated action, and he was also a party to a bill in equity, and so eventually liable to the costs of that suit, but yet he was a competent witness.

Lord Chief Justice EYRE. The inclination of my opinion is, that this evidence ought to have been rejected. The principle is admitted, that where a witness has a direct interest in the event of a cause, his testimony cannot be received. But from necessity an exception has been introduced in the case of factors and brokers, because from the nature of the transactions in which they are engaged, the contracts they make for other persons cannot be proved without them. It is true indeed, there is no magic in the term factor or broker, and that every man who makes a contract for another comes, in some sort, within the description. But here it was not simply a contract that *Bennett* made for another, but for another and himself. He

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was to have all the profit which could be made upon the sale of the indigo, above 2s. 6d. on every pound weight, the stated sum that was to be paid to his principal. His profit therefore was not to arise from the profit of the principal, but was collateral to and beyond it. He cannot wrong the principal, but he may wrong the person with whom he deals, by screwing him up beyond the real value of the goods, for the sake of his own profit, and therefore he has a separate interest to establish a particular contract which he comes to prove. It is true that an ordinary broker has an interest, but it is not such as to outweigh the necessity of his testimony being received. If he is to have 5l. *per cent.* commission on the sale, where he gets one shilling for himself he gets nineteen for his employer, and his gain arises out of the gain of his employer. But here the agent takes a profit in fact as a principal, with only 2s. 6d. for his employer. A regular broker must take care of his employer's interest as well as his own, and has not such a temptation to raise the price of the commodity to the buyer. Besides, I think the employing persons to transact business upon such terms as these is neither necessary nor convenient, but on the contrary is extremely mischievous in commerce, and not to be encouraged. Brokers are men acting in a known established character, of known description and responsibility, and therefore more fit to be trusted and employed in commercial transactions.

HEATH, J. With great respect for my Lord Chief Justice, I think this witness was admissible. I cannot distinguish him from a broker: he must, I think, be considered as a broker, and not as a principal; he is only paid for his trouble in a particular manner. The reason for admitting him is the necessity of the thing, for it is often for the benefit of trade that bargains of this kind shall be kept secret. It appears to me to be equally the interest of a broker, who is to have a per centage to screw up the price, as it was of this person. It is indeed his duty to screw up the buyer; he must tell the whole truth respecting the commodity, but having done that, it is his duty to ask the highest possible price. I cannot consider a broker as the agent for both parties; he appears to me to be solely the agent of the vendor.

ROOKE, J. I agree with my Brother *Heath* in thinking this evidence ought to have been admitted. I see no difference in
 point

point of interest, between a person who sells upon commission, and one who is to have a share of the profit (*a*): nor can I make a distinction between this witness and a common broker. He is an agent who makes a bargain between two others, and whose evidence is admissible from necessity, which is a necessity created by the parties themselves.

Lord Chief Justice. My Brothers have stated it as a principle, upon which they rest their opinions, that there is no difference between an agent taking to himself a part of the price for which he bargains, and taking a commission from his employer upon that price. If this principle can be supported, I agree that the evidence ought to have been received. Let there be a new trial.

Rule absolute.

(*a*) [Sed vide *ante*, 225, n. (1).]

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MICHEL *against* PARESKI.

Thursday,
Feb. 4th.

ADAIR, Serjt., shewed cause against a rule calling upon the Plaintiff, who was a foreigner and resident at *Dantzick*, to give security for costs, in an action on a policy of insurance. Though he admitted the general rule that a foreigner so situated was compellable to give such security, yet in the present instance he contended that the Plaintiff was exempted from the rule, as the Defendant had obtained time to plead, and had agreed to take short notice of trial, for the last sittings in the term: the application therefore came too late, as it must evidently delay the Plaintiff.

After the Defendant has agreed to take short notice of trial, the Court will not compel the Plaintiff a foreigner and resident abroad, to give security for costs (*a*).

The Court were very clearly of this opinion, saying that as the Defendant had agreed to take short notice of trial, he had waived his opportunity of making this application, which must necessarily delay the Plaintiff.

Rule discharged.

(*a*) [Vide *ante*, p. 118, note (*a*).]

LARDNER

1796.

Thursday,
Feb. 4th.

LARDNER *against* BASSAGE.

Bail must render the principal before the rising of the Court, in order to discharge themselves from an action of debt on the recognizance (a).

COCKELL, Serjt., shewed cause against a rule to stay proceedings in an action of debt against bail on their recognizance, on the ground that they had not rendered the principal [which was done at a judge's chambers] till after the rising of the Court on the *quarto die post* of the return of the writ. This he contended was irregular, it being the settled practice of the Court to require the render to be made *sedente curiâ*. *Barnes*, 82. 1 *Wils.* 270. *Impey Pract.* 3d *Edit.* 502. that probably the reason of this regulation was, that the principal was originally rendered in court, and when from the increase of business, the practice of rendering at a Judge's chambers was introduced, it was thought necessary to limit the same time for the render to be made in, as the bail would have been confined to if it had been made in court, that no advantage might be gained by merely changing the place where it was made: and he also cited *Fletcher v. Aingell*, *ante*, 117. and the note there annexed.

[594] Clayton, Serjt., in support of the rule, argued that according to the case in *Barnes* it was not necessary in *debt* on the recognizance that the Court should be sitting at the time of the render, though it was in a *scire facias*, and that this point was not before the Court in *Fletcher v. Aingell*; that the reason of the thing was in his favour, there being no reason why a render, if within the number of days required, should not be as well after as before the rising of the Court; and that since the render had ceased to be in court, *cessante ratione, cessat et ipsa lex*.

Upon a reference to the officers, they all agreed that the practice was as stated in the note in *Fletcher v. Aingell*, and therefore the

Rule was discharged.

The writ was returnable on the 27th of *January*, and the render on the 30th, which was clearly holden to be right, both days being inclusive.

(a) [Tidd's *Prac.* 287, 8th edit.]

OWEN

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Friday,
Feb. 5th.OWEN *against* SMYTH.

THIS case, which was sent by the Lord Chancellor for the opinion of this Court, stated, that in the year 1769, *George Smyth* the elder had four children, *viz.* *George Smyth* his eldest son then married, *Nicholas* his second son then married, *John* his third son then unmarried, and *Sally* his only daughter then the wife of *Samuel Sandys*.

That by indenture of feoffment of the 18th of *July* 1769, certain lands were conveyed by *George Smyth* the father and *George Smyth* the son to feoffees, to hold to them and their heirs upon such trusts as the said *George Smyth* the father and *George Smyth* the son should appoint, and in default of such appointment as to part of the premises, to the use of *George Smyth* the father for life, and as to the residue, to the use of the trustees for a term of 60 years, and after the death of *George Smyth* the father and subject to the term, as to all the lands to use of *George Smyth* the son for life, remainder to trustees to preserve contingent remainders, remainder to other trustees for a term of 500 years, and subject to that term to the use of the first son of the body of the said *George Smyth* the son, on the body of any wife which he should thereafter marry, to be begotten, and of the heirs male of the body of such son lawfully issuing, and for default of such issue, to the use of the 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, and all and every other the son and sons of the body of the same *George Smyth*, on the body of such wife to be begotten, and of the several heirs male of the body or bodies of all and every such son and sons respectively issuing, &c., and for default of such issue, to the use of trustees for a term of 600 years, and subject to that term, to the use of *Nicholas Smyth* the second son of *George Smyth* the father for life, remainder to trustees to preserve contingent remainders, remainder to trustees for a term of 700 years, and subject thereto to the use and behoof of *the first son of the body of Nicholas Smyth lawfully issuing*, and for default of such issue, to the use and behoof of the 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, and of all and every other son and sons of *Nicholas Smyth*, lawfully issuing, whether born in his lifetime, or after his death, severally and successively in remainder one after

A limitation in a deed, to the use of *A.* for life, with remainder to the first son of the body of *A.* lawfully issuing, and for default of such issue, to the second, third, and other sons of *A.* and of the several heirs male of the body and bodies of all and every such son and sons respectively issuing, gives an estate in tail male to the first son of *A.* (a).

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(a) [Vide *Galley v. Barrington*, 2 Bing. 387.]

another,

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another, as they and every of them shall happen to be in priority of birth, and seniority of age, and *of the several heirs male of the body and bodies of all and every such son and sons respectively issuing*, so that the elder of such sons and the heirs male of his and their bodies shall be always preferred, and take before the younger of the same sons, and the heirs male of his and their body and bodies lawfully issuing, and for default of such issue to trustees for a term of 800 years, and subject thereto to *John Smyth* the third son for life, and to his first and other sons in tail male, remainder to the daughter *Sally Sands* for life, and to her first and other sons in tail, remainder to the right heirs of the survivor of *George Smyth* the father and *George Smyth* the son.

There were also jointuring powers given to *George Nicholas*, and *John*, the sons of *George Smyth* the father, the words of the power, as it related to *John Smyth*, being, “It shall and may be lawful to and for the said *John Smyth*, in case he shall survive both the said *George Smyth* the son, and the said *Nicholas Smyth*, and they both shall depart this life without leaving any issue male of any of their bodies lawfully begotten, by any deed or deeds, &c.”

The trusts of the term of 800 years were, if the said *George Smyth* the son should depart this life without leaving any issue of his body lawfully begotten as aforesaid, and the said *Nicholas Smyth* shall happen to have *no issue male of his body* lawfully begotten, born in his lifetime or after his decease, *or there being such issue male, all of them should happen to die without issue male of any of their bodies*, before any of them should attain the age of twenty-one years, and there should be issue one or more daughter or daughters of the body of the said *Nicholas Smyth* lawfully issuing, then the trustees of the term, *after failure of issue male of Nicholas Smyth, and after his decease*, should raise portions, &c.

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By the same deed, a rectory holden for lives of the Dean of *Lincoln* was limited to trustees, to permit and suffer *George Smyth* the father to take the rents during his life, and after his decease to permit *George Smyth* the son to take the profits during his life, and after the decease of the survivor of the said *George Smyth* the father, and *George Smyth* the son, in trust for the issue male of the body of the said *George Smyth* the son. “And in case there should be no such son or sons, or there
“ being

“ being such, he and they shall die before any of them shall
 “ attain the age of twenty-one years, and without issue male,
 “ then in trust to permit and suffer the said *Nicholas Smyth*
 “ and his assigns to receive and take the rents, issues and pro-
 “ fits of the same premises for and during his natural life, in
 “ case the same lease shall so long continue, to and for his and
 “ their own proper use and benefit, and from and immediately
 “ after the death of the said *Nicholas Smyth*, then in trust for
 “ the eldest or only son for the time being of the body of the
 “ said *Nicholas Smyth* lawfully begotten, until such only son or
 “ some one such son shall first attain the age of twenty-one
 “ years, or die leaving *issue male of his body*, and then in trust
 “ for such son so attaining twenty-one or dying leaving *issue*
 “ *male of his body*, and *for such issue male, &c.* and a lease of
 “ tithes from the Dean and Chapter of *Christ Church Oxford*,
 “ was also limited in the same manner.”

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George Smyth the father and *George Smyth* the son both died, the latter without issue, and they made no joint appointment.

Nicholas Smyth the second son died, leaving the Plaintiff(a) his only son and heir at law. And the question for the opinion of the Court was,

What estate the Plaintiff took in the premises in question?

On the part of the Plaintiff *Williams*, Serjt., argued as follows. It is clear upon the face of the deed, that the intention of the parties to it was that the first son of *Nicholas Smyth* should take an estate-tail. This is evident from the jointuring power given to *John Smyth* the next brother to *Nicholas*, which is that “ it shall be lawful to and for the said *John Smyth*, in
 “ case he shall survive both the said *George Smyth* the son, and
 “ the said *Nicholas Smyth*, and *they both shall depart this life*
 “ *without leaving any issue male of their bodies lawfully begotten*,
 “ by any deed or deeds, &c.” So also the trusts of the term
 of 800 years are to take effect for the raising of portions for daughters, “ if the said *George Smyth* the son should depart
 “ this life, without leaving any issue of his body lawfully be-
 “ gotten, and the said *Nicholas Smyth* shall happen to have no
 “ *issue male of his body*, lawfully begotten, born in the lifetime
 “ or after his decease, or there *being such issue male, all of them*
 “ *should happen to die without issue male of any of their bodies*,
 “ before any of them should attain the age of twenty-one, &c.”

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(a) Who had taken the name of *Owen*.

Thus

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Thus likewise the leases of the rectory and the tithes are limited to trustees, in trust for "*Nicholas Smyth* for his life, " and after his death, in trust for the eldest or only son for the " time being, of the body of the said *Nicholas Smyth* lawfully " begotten, until such only son or some one such son shall first " attain the age of twenty-one years, or die *leaving issue male of* " *his body*, and then in trust for such son so attaining twenty- " one, or dying leaving *issue male of his body*, and *for such issue* " *male*," &c.

The intention then of the parties appearing upon the deed itself, it remains to be considered, whether the words used in former part of the deed in the limitation to the *first son of the body of Nicholas Smyth lawfully issuing* are not proper to give an estate-tail? Now there are words of inheritance fully sufficient for that purpose; it is not necessary to add any others, but by an easy transposition, the limitation to the several heirs male of the body and bodies of all and every *such son* and sons respectively issuing, may be applied to the first son of *Nicholas Smyth*, as well as to any other. The only difficulty there is, arises from the words "*for default of such issue*", which follow the limitation to the *first son of the body of Nicholas Smyth lawfully issuing*. But those words may be construed to mean the want of issue of the first son of the body of *Nicholas Smyth*, and then such first son would take an estate-tail: for the same construction was put on the words "*for want of such issue*", following a limitation to *every son and sons of A. which should be begotten on the body of his wife*, in *Evans v. Astley*, 3 Burr. 1570: and though that was a case on the construction of a will, yet where the intent of the parties to a deed to uses can be clearly collected from the deed itself, the deed shall be so construed as to effectuate that intent according to the doctrine laid down, *Lister v. Gray*, 2 Lev. 225. *Leigh v. Brace*, Carth. 343. *Doe*, on dem. of *Watt*, v. *Wainwright*, 5 Term Rep. B. R. 427. And accordingly in *Doe*, on dem. of *Willis*, v. *Martin*, 4 Term Rep. B. R. 39, where the intention was plain, and the limitation was, in default of an appointment, "to the use of all and every the child " or children equally share and share alike, to hold the same as " tenants in common and not as joint-tenants, and if but one " child, then to such *only child, his or her heirs* or assigns for " ever", the Court supplied the words "*their heirs*", from the words "*his or her heirs*", and annexed them to the limitation,

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" to

“to all and every the children as tenants in common”, so as to give all the children vested remainders in fee.

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Bond, Serjt., contra. No latitude of construction, nor any conjecture as to the intention of the parties can be allowed in a voluntary feoffment, beyond the precise meaning which the particular words used in the limitation import. Now as the limitation in the deed is to the first son of the body of *Nicholas Smyth* lawfully issuing, without any other words superadded, such first son could only take an estate for life, notwithstanding the intent might have been to have given him an estate-tail: this is a complete sentence, and then the deed goes on, “*and for default of such issue*, to the use and behoof of the second, third and other sons in succession, and of the several heirs male of the body and bodies of all and every *such* son and sons respectively issuing, and the heirs male of his and their bodies respectively issuing.” Now the words “*for default of such issue*” begin a new and distinct sentence; and though they appear to mark the event in which the limitation to the *other* sons successively in tail male is to take effect, for the words “*such* son and sons” clearly relate to the second, third and other succeeding sons, yet whatever implication may be made in a will, in favour of the intention of the testator, as in *Evans v. Astley*, the Court will not give an estate-tail by implication in a deed. In *Doe v. Martin* the construction was made without any violence, merely by pointing the sentence, and coupling the two branches of it together, and referring the word “*heirs*” to both. But the deed in that case was totally different from the present. As to the argument attempted to be drawn from the limitation of the leasehold property in the other parts of the deed, the true conclusion from thence is, that as the parties intended by the terms there used, that the first son of *Nicholas Smyth* should take something more than an estate for life in that species of property, so where other terms are used in the former part of the deed, they intended that he should have but an estate for life in the other property.

Lord Ch. J. EYRE. I think this is one of the clearest cases I ever saw: there is demonstration plain on the face of the feoffment, that it was the intent of the parties that an estate-tail should be limited to the eldest son of *Nicholas Smyth*. The argument on the part of the Defendant has occasionally shifted, sometimes admitting the intent, but contending that the words used

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used were not sufficient to effectuate that intent, which I thought was the true way of considering the question, and sometimes denying the intent itself. But no man can read this deed without seeing the intent I have mentioned, though by some strange blunder the usual words are omitted. If indeed it had stopped at the limitation to the first son of *Nicholas*, I should have agreed with the counsel for the Defendant; for it certainly does not follow, that because one can see an intent on the face of a deed, therefore that the words used are sufficient to effectuate that intent. But the inte herent does not rest on the first expressions, but the other parts of the deed respecting the trusts and other limitations, which were ably discussed by my Brother *Williams*, refer to an estate-tail in the first son of *Nicholas Smyth*. The intent then being plain, the question is, whether we can find sufficient words? I, for one, adhere to the rule which forbids the raising estates by implication in deeds, and think that we ought not to grant the same indulgence to inaccuracy in the construction of deeds as we do in wills. But here it is not necessary to resort to implication, or to inquire whether the same latitude is to be allowed to conveyances to uses as to wills. For here there are strict technical words capable of being applied to the limitation to the first son of the body of *Nicholas Smyth*, so as to give him an estate-tail. The limitation is to the first son, and for default of such issue the whole line of sons is taken in without any particular limitation to them and the heirs of their bodies *nominatim*, but it is “to “ the several heirs male of the body and bodies of all and *every* “ *such* son and sons respectively issuing.” Fortunately it is not said “ to the heirs male of the body and bodies of *such se-* “ *cond, third* and other sons, &c.”; if it had been so, perhaps it could not have been got over. But the limitation is to the heirs male of the body and bodies of “ *every such son*.” Now the case of *Doe v. Martin* is an authority to warrant the application of those words to the limitation to the first son of *Nicholas Smyth*, as well as to the others. But this case is stronger than *Doe v. Martin*, for it does not even require the assistance of punctuation. Upon the whole therefore it is clear that the Plaintiff took an estate-tail under the limitation in the deed to the first son of the body of *Nicholas Smyth*.

HEATH, J., of the same opinion.

ROOKE, J., of the same opinion.

The

The certificate accordingly stated, that the Plaintiff took an estate in tail male in the lands in question.

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against
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LA GRUE, qui tam, *against* PENNY.

Saturday,
Feb. 6th.

MARSHALL, Serjt., obtained a rule to shew cause why the proceedings in this action should not be set aside, on the ground that the Plaintiff, who was not an attorney, sued in his own right on a penal statute, without any attorney, and yet subscribed the notice upon the process, "*John La Grue, attorney for the Plaintiff.*"

A Plaintiff may sue in his own name, without an attorney, and subscribe the process with his name as attorney for the Plaintiff, in any action.

Le Blanc shewed cause, observing that the parties were obliged to appear in person at common law, and that it was not till the stat. *West. 2. c. 10.* was passed, that liberty was given to sue or defend by attorney (a). But still it continued optional either to sue in person or by attorney.

Marshall in support of the rule, insisted that whatever might have been the antient practice, the usage of many ages and the several statutes imposing duties on attornies, warrants to sue, and the like, had rendered that which was permitted only by the stat. *West. 2.* now indispensable: that it would be of mischievous consequence, if persons such as the Plaintiff, who was described in the affidavit to be in low and indigent circumstances, were permitted to practise and bring actions on penal statutes in their own names, on whom notices, &c. could not be served, without an attorney, who being an officer of the Court, was liable to be punished for any misconduct. Besides, the peril of costs was a restraint on bringing frivolous actions; but if the Plaintiff should not have an attorney of his own to pay, it would lessen that restraint very considerably. But

The Court clearly held, that the right of parties to sue or defend in their own name (b) still remained the same as at common law; that a penal action was the same as any other in that respect; and as to the Plaintiff calling himself the *Plaintiff's attorney* in the notice on the process, it was only a compliance

(a) At common law, the king, by virtue of his prerogative, might empower either the Plaintiff or Defendant to appoint an attorney, by the writ of *dedimus potestatem de attornato faciendo*. F. N. B. 59. So also the

party being present might name a *responsalis* to be appointed by the justices. Co. Litt. 121 a. 2 Inst. 249.

(b) Vide Sayer's Rep. 217. *Uppendale v. Lightfoot*.

with

1796. with the directions of the statute(a) as nearly as the case would admit.

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Rule discharged.

(a) Stat. 2 Geo. 2. c. 23. s. 22.

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Saturday,
Feb. 6th.

KING, qui tam, against PACEY.

In an action for the penalties of the Lottery Act, 27 Geo. 3. c. 1. s. 2. it is sufficient if the process state the sum to which they amount, as the debt, without describing it as arising from penalties, or specifying the offence, provided there be an affidavit for that purpose; and it is also a sufficient compliance with the stat. 33 Geo. 3. c. 62. s. 38. to state in the process that the Plaintiff "is appointed by the commissioners of his majesty's stamp duties to prosecute."

IN this action of debt for the penalties of the Lottery Act, 27 Geo. 3. c. 1. which was commenced by bill in the King's Bench, and removed into this court by *habeas corpus*, and in which the Defendant was holden to bail for 500*l.*, a rule was obtained to shew cause why the proceedings should not be set aside for irregularity, on two grounds, first, that the writ did not state the amount of the penalties sued for, or the cause of action; and secondly, that it did not state the Plaintiff to be an officer appointed by the commissioners of stamp duties. The first objection was founded on the 27 Geo. 3. c. 1.; the second, on the 33 Geo. 3. c. 62. The former statute, s. 2. after giving the action, goes on to say, "and upon every such action, bill, "plaint, suit or information, a *capias* or other writ shall and "may issue, *the first process specifying therein the amount of the "penalty or penalties sued for, whereof an affidavit shall be first "duly made and filed"*, &c. The latter statute, s. 38. enacts that no action shall be commenced on any of the laws touching and concerning lotteries, unless the same be commenced and prosecuted "in the name of his Majesty's Attorney-General, or "in the name or names of some officer or officers appointed by the "said commissioners of the stamp duties."

The pluriès bill of *Middlesex*, on which the Defendant was holden to bail, was as follows:—"Middlesex to wit. The sheriff "is commanded, as often as he hath been commanded, to take "William Pacey and John Doe, if they be found in his bailiwick, "and that he keep them safely, so that he may have their bodies before the lord the king at *Westminster*, on *Friday* next "after the *Morrow of All Souls*, to answer to *Richard King*, who "is appointed by the commissioners of his majesty's stamp duties, to "prosecute in this behalf, as well for himself as for his said majesty, in a plea of trespass; and also to a bill of the said *Richard* to be exhibited against the said William for 500*l.* debt, "according to the custom of the court of the said lord the king, "before

“ before the king himself, and that he then have there this *pre-*
cept. By bill.

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“ MANSFIELD and WAY.”

KING
 against
 PACKY.

The affidavit of the informer was, “ That during the drawing
 “ of the last *English* lottery, the above-named Defendant in-
 “ curred divers pecuniary penalties to the amount of 500*l.* by
 “ insuring, by himself, his clerks or agents, divers tickets in the
 “ said lottery, contrary to the form of the statute in that case
 “ made and provided.”

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In support of the first objection, *Adair*, Serjt., argued, that as the statute 27 *Geo.* 3. required the first process to specify the *amount* of the *penalty*, it ought to state that the debt was incurred by a *penalty*, and cited the case of *King v. Horne*, 4 *Term Rep. B. R.* 349.; and to shew that the application was not too late, after bail was put in, *Goodwin v. Perry*, 4 *Term Rep. B. R.* 577. With regard to the second objection, he said it did not appear to be the meaning of the Legislature, to authorize the commissioners of stamps to appoint whom they pleased to bring the action, but the Plaintiff must be some known officer, for the same reason that made it necessary to specify the amount of the penalties in the first process, namely, that the king might not be defrauded of his share of the penalties, by a compromise between the Plaintiff and Defendant. But to maintain this objection no case was cited; and indeed when the rule was moved for, the Court were clearly of opinion that the objection was groundless; it was difficult, they said, to define what an *officer* was, as mentioned in the statute, but that a person authorized by the commissioners of the stamp duties, was for this purpose an officer.

Le Blanc and *Williams*, Serjts., on the other side, contended that as the cause of action and the penalties were specified in the affidavit, the statute was complied with, and it was not necessary to repeat them in the process: it was sufficient therefore that the *ac etiam* in the bill of *Middlesex* was for 500*l.* *debt*, which was the *amount* of the penalties. And they observed that the bill of *Middlesex* in *King v. Horne*, which they produced in court, was simply “ *in a plea of debt*” without specifying the *amount* of the penalties, which was evidently contrary to the statute.

Lord Ch. Just. EYRE. We all think that we are not concluded by the case of the *King v. Horne*, and that on a mere

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against
PACKY.

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view of the statute, it is sufficient to state in the writ the sum which is sued for as the debt. If we go farther, and hold that it is necessary to describe this sum as being the amount of certain penalties, we must go on, and require the statute to be particularly set forth. But it cannot be supposed, that if this had been the intent of the Legislature, it would have expressed itself so loosely in the statute. It would therefore be wrong to put that construction upon it, unless we were forced to do so by the words of it. There is no hardship in the contrary construction, for where the party has notice by the affidavit to hold him to bail for what he is sued, he is not misled or taken by surprise, and the Court, being informed of the cause of action, is enabled to take care of the king's share of the penalties.

HEATH, J., and ROOKE, J., of the same opinion.

Rule discharged.

Wednesday,
Feb. 10th.

GIENAR against MEYER.

Foreign seamen at a foreign port enter into articles with the master, who is also a foreigner, for a voyage on board a foreign ship, and thereby agree amongst other things, not to institute any suit against the master in foreign countries, or cite him before any judge or magistrate, but that they will abide by the maritime code of their own country and the adjudication of their own courts. Having made this agreement in their own country, they cannot maintain an action in England against the master for wages, though the ship and cargo be confiscated in an English port, and the voyage thereby ended (a).

THIS was an action brought by a *Dutch* seaman against the master of a *Dutch* ship for wages. The Plaintiff entered on board the ship at *Rotterdam*, on a voyage from thence to *Barcelona*, and back again from *Barcelona* to *Rotterdam*. In *August* 1793, the ship sailed from *Rotterdam* for *Barcelona*, where she delivered her outward bound cargo, and took in another, with which she sailed for *Rotterdam*, but on her return was stopped by an *English* ship of war, brought into port, there detained a considerable time, and afterwards sold. On that occasion, the commissioners appointed under the act 35 *Geo. 3. c. 80.* to regulate *Dutch* property, called on the Defendant to deliver in accounts of the wages due to the mariners, in order that they might be paid out of the proceeds of the sale. The Defendant accordingly made out a certificate of the wages due to the Plaintiff, but calculated them as due only for the voyage from *Barcelona* to *London* in consequence of general directions from the commissioners to the masters of all *Dutch*

ships

(a) [Accord. *Johnson v. Machielsne*, 3 Campb. N. P. C. 44. See also *Abbott on Shipping*, 454. 5th ed.]

ships detained, not to reckon them upon the whole time from the sailing of the ship from the first port, but from the port where the cargo which was on board at the time of the detention was taken in. The ship had been out from *Rotterdam* twenty-four months and seven days, eighteen months and seven days of which time were allowed for by the commissioners, and this action was brought to recover the wages due for the remaining six months for the voyage from *Barcelona* to *Rotterdam*, the freight for which the Defendant admitted he had received, but insisted that he was not liable to be sued in this country, and that the Plaintiff ought to resort to the courts of *Holland* for his remedy. This objection was grounded on the ship's articles, which, as translated from the *Dutch*, were in the following terms:

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“ We the underwritten officers and mariners acknowledge to
 “ have hired ourselves in the service of the ship *Catharina*
 “ *Quirina*, commanded by Captain *Hendrick Meyer*, now lying
 “ at *Rotterdam*, and destined to *Barcelona* and all such places,
 “ bays, and sea-ports as the captain may deem most expedient
 “ to his owner's interest, for the monthly wages agreed on and
 “ hereunder specified, and to sail with convoy the full month
 “ commencing from the day of the date hereof, and *the voyage to*
 “ *end and be completed when we shall have returned with our said*
 “ *ship to this city or in any sea-port of this country*, and that the
 “ cargo on board be unladen, and we duly discharged by our
 “ said captain. But in case *that one or more complete voyages*
 “ *be made out of the country*, the captain shall at every second
 “ place of delivery secure to us two thirds of our wages, by an
 “ order on his purser or correspondent resident here, and the
 “ remaining third on the discharging and paying off the crew.
 “ But if the captain shall be *obliged to touch at different places*
 “ *and shall there load or unload some goods*, it is not to be con-
 “ sidered as the performance of perfect voyages.”

There then followed some regulations respecting the discipline of the ship, and afterwards the following article:

“ None of us shall institute *any suit against the master of the*
 “ *ship in foreign countries, or cite him before any judge or magis-*
 “ *trate, but shall from thenceforth be bound to abide by the ordi-*
 “ *nances of the maritime code of this city, and the adjudication*
 “ *of the noble Court of Holland.*” Lastly, we the underwritten
 “ respectively, and each for himself acknowledge, that we

T T 2

“ have

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“ have bound ourselves under the hereinbefore specified conditions, and that we have now received one month in advance of our stipulated wages, and have subscribed these with our usual signatures; done at *Rotterdam*, the 29th of August 1793.”

The Chief Justice was of opinion at the trial, that as the Plaintiff had agreed by the articles not to sue the master in any foreign country, the action could not be maintained; his Lordship therefore directed a nonsuit, subject to the opinion of the Court, on the facts above stated.

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A rule having been granted to shew cause why the nonsuit should not be set aside, and a verdict entered for the Plaintiff, *Adair*, Serjt., shewed cause. By the terms of the articles, though *Barcelona* was a destined port, yet the master was at liberty to go to any other port he might think expedient. It was therefore in the contemplation of the parties that the ship might go to any other foreign country. With this in view, they enter into a solemn engagement not to institute any suit against the master in any foreign country, but to abide by the maritime code of *Rotterdam*, and the adjudication of the Court of *Holland*: and having so done, they cannot be permitted to sue in the courts of this country in direct violation of their engagement. It is not necessary to resort to the laws of *Holland* to ascertain the validity of this contract, for if it had been executed in *England*, it would be binding. It is a just and reasonable contract, as it would be productive of great hardship and inconvenience to the master, if he were to be sued in a foreign country where he had no funds to answer the demand. If a ship is taken or lost before any complete voyage is performed, the mariners are not entitled to any wages at all, though by a construction favourable to them, one voyage is divided into two, namely, the outward and homeward bound voyage; it would therefore be very doubtful whether the Plaintiff could have recovered any part of his wages for the former eighteen months, if it had not been given him by the bounty of the crown.

Le Blanc, Serjt., *contra*. As the Defendant received freight for the outward-bound voyage, and as freight is the mother of wages, the last argument used on the part of the Defendant falls to the ground. The only question is, Whether the articles will prevent the Plaintiff from bringing an action in this country?

country? It is not a deed under seal, but merely a written agreement, which may be construed according to the circumstances of the case, and the nature of the voyage performed. The meaning of the latter clause is, that the mariners will not sue before the end of the voyage, not that they will not sue at the place where the voyage is ended. It is true, that the articles consider the voyage as to be ended in *Holland*, but they do not provide for the case which has really happened, that of the voyage being ended in another country. Suppose the master had discharged the men here, and remained here himself, without their having the means of returning to *Holland*, they could not in that case have been obliged to sue in *Holland* where neither he nor they were resident. Or suppose the ship to be so damaged in a foreign port, as to make it necessary to sell her and the cargo, and the master had received the money, surely the mariners might have sued at that place. And it was holden in *Chandler v. Grieves (a)*, in this Court, that where a seaman

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(a) *Chandler v. Grieves*, in C. B. Hil. 32 Geo. 3.

This was an action of assumpsit for a seaman's wages. The facts of the case were, that the Plaintiff was a seaman on board a ship which was articulated for and sailed upon a voyage from *London* to *Honduras*, from thence to *Philadelphia* in *North America*, and from thence back again to *England*. The articles were drawn in the usual form. While the ship was in the *Bay of Honduras*, the Plaintiff received so violent a blow from a piece of timber accidentally falling upon him while he was on board, that he was entirely disabled from doing any duty whatever. On the arrival of the ship at *Philadelphia*, he was put on shore and there left, and his wages paid up to that time, but this action was brought for the whole wages, including the remainder of the voyage, viz. from *Philadelphia* to *England*.

Lord *Loughborough* was of opinion at the trial, that as the Plaintiff had not performed the whole voyage though without any default on his part, he was not intitled to wages for the whole. The jury took a middle course, and gave a verdict for the amount of the wages up to the time when the ship left *Philadelphia*.

In *Michaelmas* Term, 32 Geo. 3. a rule was granted to shew cause why the verdict should not be set aside and a new trial granted, and now *Bond*, Serjt., shewed cause, contending that the Plaintiff was intitled to wages for the whole voyage, on two grounds; first, that in general by the common law, no contract for wages was apportionable; secondly, that in particular by the law marine and usage of the sea, contracts for seamen's wages could not be apportioned. To establish the first point, he cited Bro. Abr. tit. Apportionment, pl. 13., id. tit. Labourers, pl. 48., id. tit. Contract, pl. 31., 3 Vin. Abr. 8 & 9 Burr. Settl. Cases, 675. *Rex v. the Inhabitants of Madington*. In sup-

A seaman belonging to a merchant ship which is articulated for a certain voyage, is prevented from performing the whole voyage by being disabled by an accident happening in the course of his duty: he is intitled to wages for the whole voyage (a).

(a) [Accord. *Paul v. Eden*, cited *Abbott on Shipping*. 444. (n). 5th ed.]

port

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seaman was prevented by an accident from performing the whole voyage, he was still intitled to his wages for the whole. The ship in the present case was neither taken in battle nor lost, but the voyage was ended, and if the seamen can sue nowhere but in *Holland*, the captain must provide some means of conveying them to that country. But being a stranger in this country, he cannot do that when his ship is taken from him.

[607] Lord Ch. J. Although no persons in this country can by an agreement between themselves exclude themselves from the jurisdiction of the king's courts, and though it must be admitted that contracts are transitory, and that a personal action follows the person, and that the contract in question is of such a nature as to be agreeable to our laws, yet when the parties, who are foreigners, bind themselves in their own country not to sue in any other, and when by suing here they put the Defendant under an intolerable hardship, I think we ought to look into the contract, in order to see what effect it would have, and how it could be enforced in the country where it was made, that we may not do any thing here unjust or contrary to the laws of that country. Now it appears to me to be good according to my apprehension of those laws, or at least as there is no evidence to shew that it is not good, we must presume it to be so. Then the first thing that stares us in the face is, an agreement that they will not resort to our laws. There is nothing unreasonable in this; the parties are domiciled in *Holland*, the contract is to perform the whole voyage ending in *Holland*,

port of the second, 15 Vin. Abr. tit. Mariners, 234., Miegé's Laws of Oleron, p. 5. s. 7. p. 8. s. 19., Malync's Lex Merc. 103. c. 22.; and he observed, that the laws of Oleron were received by all nations in *Europe*, 1 Black. Comment. 419., 4 Black. Comment. 423., and ought to prevail in the present case.

The Court said, that clearly the law marine ought to be followed in the construction of the contract, and they directed an inquiry to be made in the Courts of Admiralty whether, according to the usage there adopted, a disabled seaman in similar circumstances would be intitled to wages for the whole voyage, or only up to the time when he was so disabled?

On this day, the counsel for the Defendant stated, that in pursuance of the direction of the Court, an inquiry had been made as to the usage of the Admiralty, and that in every instance there to be found, a seaman disabled in the course of his duty was holden to be intitled to wages for the whole voyage, though he had not performed the whole. In consequence of which

The rule was discharged.

and

and to seek their remedy in their own courts of justice. As a maritime contract, it is clearly a beneficial one, as it creates an additional tie on the seamen not to leave the ship in any part of the voyage. Then if the contract be agreeable to the laws of *Holland*, what are the particular circumstances of the case? The ship and cargo are seized, but the men are not made prisoners, but are at liberty to return to their own country. Now it is obvious that the master would be placed in a very cruel situation, if after the ship and cargo were confiscated, he was to be sued in a foreign country for wages for a voyage, the proceeds of which might be either remitted, or on board the ship so confiscated: the effect of it might be to cause him to lie in a foreign gaol, perhaps for life. It seems therefore to me more reasonable to send the parties to their own country, there to pursue their remedy.

HEATH, J., of the same opinion.

ROOKE, J. There is no doubt of the right of the Plaintiff to the wages, the only question is, whether the Defendant is liable to be sued here? Now the words of the articles are positive, that the mariners will not institute any suit in foreign countries, but will be bound to abide by the ordinances of the maritime code of *Rotterdam*, and the Court of *Holland*. If so, the construction contended for by my Brother *Le Blanc*, with respect to the voyage being ended in another country, is unfounded. There is nothing to prevent the parties from going to *Holland*: and as to the supposed case of the captain not being there, if the law of *Holland* is like that of our own country, which we must for this purpose take it to be, the owners would be liable to the seamen, though the master were absent. The hardship thrown on the master by a contrary construction, would be grievous in the extreme. I therefore think that the nonsuit was right.

Rule discharged.

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against
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PARROTT,

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Thursday,
Feb. 11th.PARROTT, One, &c. *against* SPRAGGON and Another.

[In the Exchequer Chamber. In Error.]

Though it appears on the return to a certiorari that no bill was filed in the King's Bench against the Defendant, (in a suit there by bill) in the term of which the declaration is intitled, but that a bill was filed against him by the Plaintiff in the following vacation, it is not erroneous if it also appear that the bill was filed of the preceding term (a).

IN an action by bill as of *Trinity Term*, 34 *Geo. 3.* against an attorney in the King's Bench as acceptor of a bill of exchange, a judgment went by default, and a writ of error being brought, the error assigned was, that there was no bill filed between the parties in *Trinity Term* 34 *Geo. 3.* to warrant the declaration and judgment, upon which a certiorari issued, reciting the error assigned, and requiring the Chief Justice of the King's Bench to certify whether there was *any such bill* between the parties filed of record in that Court in *Trinity Term* 34 *Geo. 3.* The return to the certiorari stated, "that it did not appear that any bill was filed of record between the parties in the said *Trinity Term* in the 34th year of *Geo. 3.* But by the said file of bills of *Trinity Term* aforesaid, it appeared that a bill was filed of the aforesaid *Trinity Term* between the parties, in the vacation of the aforesaid *Trinity Term*, to wit, on the 11th day of *October*, in the said 34th year of his said majesty's reign, as by the said bill, &c. would appear."

Wood for the Plaintiff in error. By law, no bill can be filed in a court of common law in vacation; but it must be in term. This appears from the form of it, which states the Defendant as being present in court, which cannot be in the vacation, when the court does not sit. If a bill therefore be filed in the vacation stating the Defendant as being then present in court, there is a contradiction on the record, which is the case here. It is necessary that the bill should be filed, to warrant the proceedings. Thus the statute 4 *Anne*, c. 16. s. 2. extends the statutes of *Jeofails* "to judgments by default, provided there be an original writ or bill duly filed," and in contemplation of law, that must be in term. It is true, in practice, bills are often filed in vacation as of the preceding term, and that the same practice prevails *nunc pro tunc* with respect to the declaration and other parts of the pleadings, but a court of error cannot take notice of that practice unless it were certified on the record; they can only look to the record; and upon this record it appears as a fact by the return to the certiorari, that the bill was not filed in term, but in vacation. If the return had been only,

(a) [See *French v. Cook*, 1 Taunt. 126. 2 Saund. 101. s. (n). 5th ed.

that

that a bill was filed of *Trinity Term*, the Court would not have inquired whether it was really filed in term or not: but they cannot reject any part of the return as it now stands. If it appeared on record that a declaration or plea, &c. were delivered or filed in vacation, it would be clearly erroneous, as it would tend to invert the whole judicial arrangement of the country. All proceedings at law must appear to be in term, when the courts of law are open, and not in vacation, when they are shut. Another objection to the record is, that the return does not state whether *such* a bill was filed as would warrant the declaration and judgment, the bill ought to have been set out *verbatim* to shew to the court that there was no variance, but that *such* a bill had really been filed as would justify the entry on the record; but the return merely is, that *a* bill was filed.

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The counsel who was going to argue on the other side was stopped by the Court.

Lord Chief Justice EYRE. The argument for the Plaintiff in error is an ingenious one; as it is admitted to be the practice of the Court of King's Bench to file bills in vacation as of the preceding term, and the return to the certiorari shews that there is a bill filed of the term preceding, it is not necessary to inquire into the precise time when it was filed. The real question is, whether there is a bill on the file of that term, and if there is, this Court will not inquire how it came there. As to the other objection, if the certiorari had been to certify whether there were any defect in the bill itself upon the record, such a return would have been imperfect, but as the case stands, it is wholly immaterial.

Judgment affirmed.

NICHOLSON

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Thursday,
Feb. 11th.NICHOLSON *against* GOUTHIT.

A. being in insolvent circumstances, *B.* undertakes to be a security for a debt owing from *A.* to *C.*, by indorsing a promissory note made by *A.*, payable to *B.* at the house of *D.* The note is accordingly so made and indorsed with the knowledge of all parties.

Just before it becomes due *B.* being informed that *D.* has no effects of *A.* in his hands, desires *D.* to send the note to him *B.*, and says he will pay it. [*B.* having then a fund in his hands for that purpose, it is not presented at *D.*'s house till three days after it is due.]

C. cannot maintain an action against *B.*, on the note, without having used due diligence in

presenting the note as soon as it was due to *D.*, for payment, and in giving immediate notice to *B.* of the non-payment by *D.*: for *B.* has a right to insist on the strict rule of law respecting the indorser of a note, notwithstanding the particular circumstances of the case (*a*).

ASSUMPSIT by the indorsee against the indorser of a promissory note, which was made on the 3d of *March* 1793, by *William* and *Samuel Green* for 50*l.* payable to the Defendant at eighteen * months, at the house of *Drury* and Co.; the Defendant indorsed it to *Burton*, and he to the Plaintiff. The facts of the case were, that the *Greens* being considerably indebted to various creditors, and among the rest to the Plaintiff, it was agreed that their debts should be paid by instalments, the last of which *Burton* and the Defendant undertook to guarantee, for which purpose the note in question was indorsed (with others to other creditors) by them as a security for the debt due to the Plaintiff. A little time before the note became due, the Defendant knowing that *Drury* and Co. had no effects in their hands of the *Greens*, directed them to refer the persons who should present the notes at their house for payment, to him, and he would pay them. Many of the notes were accordingly brought to the Defendant when they were due, and were paid. But the note in question, though due on the 3d of *October* 1794, was not demanded at the house of *Drury* and Co., till the sixth of that month, on which day it was presented to the Defendant, though the parties all lived near each other. If it had been presented to him when due, it would have been paid, as *Burton* had lodged a sufficient sum of money in his hands for that purpose, but which he paid away, when he found the note did not come to him as he expected.

At the trial it was objected, that the Plaintiff had been guilty of laches, as he had neither demanded payment of the note at the place where it was payable, in due time, nor given notice to the Defendant of non-payment by *Drury* and Co., and therefore could not recover.

But the Chief Justice was of opinion that under the particular circumstances of the case the strict rule of law might be dispensed with, for as the Defendant knew from the beginning of the transaction, that *Drury* and Co., at whose house the note

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(a) [Vide ante, p. 336, note (a).]

was

was payable had no effects of the *Greens* in their hands, as he had undertaken to guarantee the payment of a debt by means of the note, and had provided money for that purpose, he could not be injured by the delay of the Plaintiff, from the third to the sixth of *October*; and with respect to the want of notice, his Lordship thought, that as the Defendant had himself desired *Drury* and Co. to send the notes to him for payment, he had either waived the necessity of notice, or at least must be considered as having had notice by anticipation; and a verdict was found for the Plaintiff.

A rule having been obtained to shew cause why the verdict should not be set aside, and a nonsuit entered, *Bond*, Serjt., in shewing cause rested on the opinion of his Lordship at *Nisi* [611] *Prius*, which is above stated.

In favour of the rule *Cockell* and *Heywood*, Serjts., argued that the rule of law which required both a demand as soon as the note became due, and immediate notice in case of non-payment, could not be dispensed with, and in the present instance there had been neither. Unless such demand be made on the maker, and notice given to the indorser as early as possible, no period can be fixed when the liability of the party shall cease. It is true that where the drawee of a bill of exchange has no effects of the drawer in his hands, notice of non-acceptance or non-payment need not be given to the drawer; yet the rule with respect to an indorsee is totally different, to whom notice of the default of the drawee must in all cases be given, in order that he may seek his remedy against the drawer or any prior indorser. Thus, though it is not necessary to present a bill for acceptance before the day of payment, yet if it be presented for acceptance before that day, and the drawee refuses to accept it, immediate notice of such refusal must be given to the indorser, to make him responsible, 5 *Burr.* 2670. *Blesard v. Hirst*, 1 *Term Rep. B. R.* 712. *Goodall v. Dolley*. But in truth there is no analogy between bills of exchange and promissory notes, in their nature or original creation. A bill of exchange is a transfer by *A.* of a debt due to him from *B.* to *C.*; a promissory note is an acknowledgement by *A.* of a debt due from him to *B.*, and a promise to pay it. The resemblance between the two instruments begins only when the note is indorsed: "for then," (to use the words of Lord *Mansfield* in *Heylin v. Adamson*, 2 *Burr.* 676.) "it is an order by the
" indorser

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“ indorser upon the maker of the note to pay to the indorsee.
 “ The indorser only undertakes, in case the maker of the note
 “ does not pay : the indorsee is bound to apply to the maker
 “ of the note ; he takes it upon that condition, and if after the
 “ note becomes payable, he is guilty of a neglect, and the maker
 “ becomes insolvent, he loses the money, and cannot come upon
 “ the indorser at all.” As to the particular circumstances of
 the case, when it was agreed that the Defendant should become
 a surety for the *Greens* by indorsing a promissory note, it must
 have been understood by the parties that as he stood in the cha-
 racter of an indorser, he had a right to insist that the holder of
 the note should use due diligence before he should be sued :
 for it is a clear rule that the mere knowledge of the indorser
 [612] that a bill or note has been or will be dishonoured, will not be
 equivalent to, nor does it dispense with notice to him from the
 holder.

Lord Chief Justice. That the justice of this case is with the
 Plaintiff, there can be no doubt. The Defendant agreed to
 guarantee the payment of a debt by instalments ; it was clear
 that the *Greens* were insolvent, and the meaning of the parties
 was, that in that event the debt should be paid by the Defend-
 ant. The difficulty arises from the mode which they have
 chosen in which the guarantee shall take place, by the indorse-
 ment of a note. The question then is, whether, when the
 guarantee is taken in this shape, all the legal consequences do
 not follow so as to limit its generality ? Upon consideration, I
 cannot say that they do not follow, and they require a demand
 on the maker, and notice to the indorser within a reasonable
 time. Now though there were both in this case, yet neither
 was in reasonable time. The rule of law therefore must pre-
 vail, and that will discharge the Defendant. When he applies
 to *Drury* and Co., and is apprised that there are no effects in
 their hands, he says, “ send the notes to me, and I will pay
 them.” Now this seems to be the same as saying “ If the notes
 are presented to you for payment, I will pay them.” But this
 must be construed to mean, that if they were duly presented he
 would pay them. There is nothing to shew that he meant to
 pay them at whatever time they should be presented. The con-
 versation between these parties seems to have been nothing
 more than an acknowledgement by *Gouthit*, that he was in-
 dorsee, and that if the notes were sent to him in the regular
 course,

course, they would be paid. If we could go beyond this, we might reach the justice of the case. But perhaps it is better to adhere to a rule, however strict, than relax it. It sounds harsh that a known bankruptcy should not be equivalent to a demand or notice, but the rule is too strong to be dispensed with.

HEATH, J., of the same opinion.

ROOKE, J., of the same opinion.

Rule absolute.

1796.

NICHOLSON
against
GOURT.

[613]

OXLEY *against* YOUNG and Another.

Friday,
Feb. 12th.

IN this action of assumpsit the declaration stated that before the promise and undertaking of the Defendants, one *Andrew Sheron Bystrom* of *Gottenburgh* had ordered from the Plaintiff certain goods of the value of 260*l.* to be sent to him by the Plaintiff, and therefore in consideration that the Plaintiff at the request of the Defendants would execute the said order, the Defendants undertook to pay him 130*l.* on being drawn upon at the expiration of nine months from the date of the invoice of the Plaintiff, in a bill at three months. It was then averred that the Plaintiff executed the order, and sent the goods to *Bystrom*, and drew upon the Defendants, at the expiration of nine months from the date of the invoice, a bill of exchange for 130*l.* at three months; but the Defendants neither accepted the bill nor paid the money, &c. There were also other counts, but not materially different from the first. The general issue being pleaded, a verdict was found for the Plaintiff on the following facts. On the 6th of *February* 1793, the Plaintiff wrote to the Defendants informing them that he had received an order from *Bystrom* of *Gottenburgh*, for certain goods, with directions to draw on the Defendants for half the amount of them, and requesting to know whether he could rely on their acceptance of his bill. To which on the 9th of *February* the Defendants answered, that they had received a letter from *Bystrom* desiring them to accept the Plaintiff's bill for 130*l.*, but as *Bystrom* was a stranger to them, and his letter was not

A. having sent an order to *B.*, for certain goods, *C.* undertakes to guarantee payment to *B.*, upon an undertaking of *D.* to indemnify *C.* *B.* accordingly informs *C.* that the goods are preparing, and afterwards ships them for *A.*, without giving notice to *C.* that they are shipped. Afterwards *D.* desires to recall his indemnity, upon which *C.* writes to *B.* to know whether he had executed the order, to which no answer is given by *B.*, for a considerable time,

he having gone abroad in the interim. Upon this *C.*, supposing from the silence of *B.* that the order was not executed, gives up his indemnity to *D.* *C.* still remains liable to *B.*, on his guarantee (*a*).

(*a*) [Vide *Nares v. Rowles*, 14 East, 510.]

accompanied

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accompanied with the guarantee which he mentioned would be sent with it, they declined entering into any engagement for him. But this guarantee having soon after arrived, the Defendants on the 12th of *February* wrote again to the Plaintiff, signifying, that having received the guarantee they were ready to undertake for the 130*l.* to be drawn upon in the manner stated in the declaration. The guarantee was contained in a letter from *Echmans* and Co., the Defendants' correspondent at *Gottenburgh*, which stated that it was written to confirm the credit of *Bystrom*, and as a guarantee to the Defendants for any business they might transact for him as far as 600*l.*, and that as an indemnity to the Defendants, *Bystrom* had promised to provide them proper remittances. To this letter the Defendants answered that they had ordered the goods for *Bystrom* from the country. On the 18th of *February* the Plaintiff returned an answer to the Defendants' letter of the 12th, saying that in consequence of that letter he proposed *putting the order in hand for Bystrom.*

On the 25th of *March* the Defendants stopped payment, which was soon after known to the Plaintiff, and did not resume their payments till after the goods were shipped, which was done by the Plaintiff in *June* following according to the direction of *Bystrom*, the invoice being dated *June 22, 1793.* On the 6th of *September* following, the Defendants received from *Echmans* and Co. a letter, the purport of which was, that they *recalled their guarantee* for *Bystrom*, as he had not made any use of it, nor would in future, and desiring the Defendants not to send him any goods on the faith of it. To this the Defendants immediately answered, that as they were advised that *Bystrom* had made use of the credit given him, they must inquire whether the persons who had executed *Bystrom's* orders would release them (the Defendants) from their obligations, before they could consent to *Echmans* and Co. recalling their guarantee. On the same 6th of *September* they wrote to the Plaintiff, to know whether he had executed any order for *Bystrom* in consequence of their letter of the 12th of *May*, presuming he had not, as *he had not advised them of it.* Not receiving any answer from the Plaintiff to this for some days, on the 10th of *September* the Defendants gave up to *Echmans* and Co. their guarantee, by writing another letter to them, stating that one house at *Halifax* had shipped some goods for *Bystrom* on their credit,

credit, and requesting *Echmans* and Co. to see that a remittance was sent for the amount of those goods, but *that this appeared to be the only part of the credit, which Bystrom had used.*

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On the 1st of *October* the Defendants received a letter from the Plaintiff dated *Groningen, September 21st*, in which he said, that being from home upon business, a letter was sent to him from the Defendants (meaning their letter of the 6th of *September*), but not having his papers to refer to, he could only say that he had sent a parcel of goods to *Bystrom*. In answer to this the Defendants wrote to the Plaintiff, observing that the goods which he had shipped for *Bystrom* could not be on their guarantee; otherwise he ought to have advised them at the time they were sent, and that he had been so long in answering their letter of the 6th of *September*, that in the mean time they had written to *Echmans* and Co. giving an account of all the goods that had been shipped for *Bystrom* on their credit. After this, the Defendant wrote again to *Echmans* and Co. stating that since their letter of the 10th of *September*, the Plaintiff had applied to them for the payment of 130*l.* for goods shipped for *Bystrom*, and as there was a probability of a dispute, requesting *Echmans* and Co. to retain the funds or securities of *Bystrom*, if they still had any, for that sum: to which *Echmans* and Co. replied, that they had then no funds in their hands for the payment of that sum.

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In *March* 1794 (at the end of nine months from the date of the invoice of the goods sent by the Plaintiff to *Bystrom*), the Plaintiff drew a bill of exchange on the Defendants for 130*l.* at three months, which being neither accepted nor paid by them, this action was brought.

A verdict having been found at *Guildhall* for the Plaintiff, a rule was obtained to shew cause why there should not be a new trial, on two grounds, first, that the Plaintiff ought to have given notice to the Defendants of his having shipped the goods for *Bystrom*; and secondly, that the Defendants were intitled to an immediate answer to their letter of the 6th of *September*, and that the Plaintiff ought to have left some confidential person at his house in his absence, with authority to open and answer letters, instead of sending them to him upon the Continent.

Le Blanc, Serjt., shewed cause. The Defendants having undertaken expressly to secure to the Plaintiff the payment of the value of the goods which *Bystrom* had ordered, by a bill drawn at

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at a stipulated time, cannot recede from their engagement. They were hasty in returning their guarantee to *Echmans* and Co., and cannot make that a ground for discharging themselves from their responsibility to the Plaintiff. There is no pretence to say that notice was necessary to be given to them when the goods were actually shipped, there being no stipulation for such notice. They had sufficient notice by the Plaintiff informing them that he should put the order in hand, and by the bill being drawn upon them. And with respect to the delay in the answer to their letter of the 6th of *September*, there is no rule of law which requires a merchant, who is going abroad to transact his necessary business, to leave a person behind him to answer his letters.

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Adair and *Cockell*, Serjts., for the rule. Though there was no express stipulation that notice should be given of the goods being shipped, yet the Plaintiff was bound in this, as in all other commercial transactions, to use due diligence, and therefore he ought to have given such notice: and still more ought he to have taken care that an immediate answer was sent to any letters of the Defendants which might be addressed to him in his absence, as he knew that their guarantee to him was to be given, not on the credit of *Bystrom*, but of third persons, *viz.* *Echmans* and Co. A person carrying on trade at a particular place, is answerable for any loss which might happen by his neglect in not having a proper agent on the spot to answer letters, and transact his business, during an occasional absence. The question is not, whether the answer to the Defendant's letter of the 6th of *September* came in reasonable time from *Groningen*, but from *Norwich* where he lived.

Lord Ch. J. EYRE. I did not encourage this motion when it was made, and I am now convinced, after hearing the argument, that the verdict was properly found. The right to sue on the guarantee attached, when the order was put in a train for execution, subject to its being actually executed. Then the question is, whether any thing happened to divest that right? Now the right could not be divested, even by a wilful neglect of *Oxley*, though perhaps he might be liable to an action on the case at the suit of *Young* and Co., if any such neglect could be shewn, contrary to all good faith, and by which a loss had been incurred. But still this could not discharge *Young* and Co. from their engagement. They have been unfortunate in concluding

too hastily from not receiving an answer from *Oxley*, that the order was not executed.

HEATH, J., of the same opinion. The counsel have contended, that a merchant when he goes abroad is obliged to leave a confidential clerk behind him to manage his concerns. This is true where he undertakes to do any act, such as to accept bills, or pay money; but he is clearly not bound so to do, for any other purpose.

ROOKE, J., of the same opinion.

Rule discharged.

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MESURE against BRITTEN.

Friday,
Feb. 12th.

LE BLANC, Serjt., shewed cause against a rule to set aside a judgment signed for want of a plea, on the following circumstances:—The rule to plead was given on the 30th of *January*, which expired on the 2d of *February* being a four day rule, and both the *first and last days being reckoned inclusively. Judgment was signed on the 3d of *February* at the opening of the office in the afternoon.

Though a rule to plead expires on a *dies non juridicus*, *ex gr.* the *Purification*, the Defendant is bound to plead on or before that day, and if he does not, judgment may be signed on the next day.

The ground of the objection on the other side, on which the rule was obtained, was, that the 2d of *February* being the *Purification*, and therefore a *dies non juridicus*, the Defendant could not plead on that day, but had the whole of the next day for that purpose. But *Le Blanc* observed, that though the courts did not sit on the *Purification*, yet the offices were open, and therefore the Defendant might have pleaded on that day; and he relied on the case of *Baddeley v. Adams*, 5 *Term Rep. B. R.* 170.

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Clayton, Serjt., in support of the rule, contended that when a *dies non juridicus* was the last of the four, it was considered as a *Sunday*, for which he cited *Impey Pract. C. P.* 281., and therefore that the rule was not out till the end of the day following. That as to the case of *Baddeley v. Adams*, the question there was, whether bail could be put in on a *dies non*, and the Court determined it on the ground that on such a day business might be done at a judge's chambers; but when a party pleads he is supposed to be in court, which could not be on a day when the Court does not sit.

Upon a reference to the officers, they all agreed that the practice

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Lord Ch. J. The meaning of a Defendant being allowed a certain time to plead in is, that he may have a reasonable time to consider of his defence. It is absurd therefore now to refer to the old mode, when the proceedings were *ore tenus*. The reason of *Sunday* not being a day of business, is the decent observance of the *Sabbath*, but as the offices are open on these other *dies non juridici*, the party may certainly then plead.

Rule discharged.

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Friday,
Feb. 12th.

HOWARD and Another *against* BAILLIE, Executrix of
BAILLIE.

Semble that a letter of attorney given by an executor to A. enabling him to transact the affairs of the testator in the name of the executor as executor, and to pay, discharge and satisfy all debts due from the testator, conveys a sufficient authority to A. to accept a bill of exchange, in the name of the executor, drawn by a cre-

THE facts of this case, and such of the arguments as were material, are stated in the following judgment, which was thus delivered in the name of the Court by the Lord Chief Justice.

A new trial has been moved for in this cause, in which the Plaintiffs, being the drawers of a bill of exchange upon the Defendant dated 10 *January* 1794, for 290*l.* 18*s.* 3*d.* value in account with *James Baillie* (whose executrix the Defendant is), payable upon the 1st of *September* 1795, to their own order, and which bill of exchange was accepted by the Defendant by *Edmund Thornton* her procurator, having recovered a verdict for 330*l.* damages. The ground made for this application is, that upon the case in evidence *Mr. Thornton* was not the procurator of the Defendant duly authorized to accept this bill for her. The case was shortly this, *Mrs. Colin Baillie* being the sole acting executrix of *James Baillie*, who died possessed of a large *West India* and other property, and largely indebted to many

ditor for the amount of a debt due from the testator, so as to make the executor personally liable. But clearly if the executor admits that such a bill, which has been so accepted by A. with the knowledge of the executor, is for a just debt, and that it ought to be paid, it affords sufficient evidence of an authority given by him to A. to accept that particular bill, without resorting to the letter of attorney (p).

(a) [See *Gardner v. Baillie*, 6 T. R. 591. in which, upon an action being brought upon another bill accepted by A. in the name of the executor, the Court held, that the Plaintiff was not entitled to recover, and stated that the judges of this court concurred in

that resolution. It seems therefore that the present case must be considered as having been determined on the admission of the executor. See also, *Hay v. Goldsmidt*, cited 1 Taunt. 349.]

persons,

persons, and among others to the Plaintiffs in the sum of 290*l.* 18*s.* 3*d.*, executed a power of attorney to *George Baillie* and *Edmund Thornton* jointly and severally to act for her in collecting and getting in the estate of the deceased, and paying his debts. These two persons acted under the power. The business respecting the estate was transacted by one or other of them at the counting house where *James Baillie's* business was carried on in his life-time, and where the business of a new firm, at the head of which was *George Baillie*, was also carried on after the death of *James Baillie*. At this counting house the bill in question was accepted, in the name of the Defendant, by *Edmund Thornton*, one of the attornies, as her procurator, in payment of a debt due from the estate of *James Baillie*; and this was a mode adopted by the attornies [whether with or without the privity of *Mrs. Baillie* at present I do not stay to inquire], for the payment of the tradesmen's bills due from the estate. For the Defendant it is insisted, that the attornies had no authority to provide for the payment of the testator's debts in this manner, that they were to administer the assets for the executrix, but that they could do no act whereby she should become *chargeable with the debts in her own right*, and particularly that they were not authorized to *give a security* for the payment of any debts in her name. This makes it necessary to look into the power of attorney, to view and to consider the general scope of it, and to examine the different parts of which it consists, as far as they may seem to bear upon the present question. The general scope of it is to put the whole estate into the hands of the attornies, to commit the collecting of it, and the disposition of it entirely to them, to delegate to them all the authority that the executrix possessed, and to constitute them, as far as it was possible to constitute them, executors in her name. The first part of the instrument respects more particularly the collecting of the estate; and powers more ample could not be devised, nor confidence more unlimited be reposed and expressed. The authority to pay, discharge and satisfy debts is described in few words, and more general terms, and with a qualification properly applicable to this branch of the power, "*agreeably to the due order and course of law, to pay, discharge and satisfy*", which I consider as tantamount to saying *in a course of administration*. Then follows a general authority to do such further lawful and reasonable acts, for the better

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performing the powers and authorities intended to be given, as to them should seem meet, the executrix professing to give to them her full and whole power and authority to do and act touching and concerning all or any of the premises, as fully and effectually to all intents, constructions and purposes, as she as executrix could do if personally present, and undertaking to ratify all that the attornies should lawfully do in and about the premises. There is also power to appoint attornies to act in the name of the executrix. The authority to pay debts, upon the first view of it, seems to be more confined and specified than the authority to collect the effects; but if we consider it more attentively, we shall find that the effect of this part of the instrument is to commit the application of the personal estate in payment of debts to those attornies absolutely and exclusively; and it will also be found, without the assistance of general words, that an authority of this nature necessarily includes medium powers, which are not expressed. By medium powers, I mean all the means necessary to be used, in order to attain the accomplishment of the object of the principal power, which in this case is the paying, satisfying and discharging the testator's debts. It must occur to every man who reflects upon the nature of this trust, that numberless arrangements would be to be made by those who were to execute it, accounts to be settled, disputed claims to be adjusted, unjust ones to be resisted, suits at law and in equity to be instituted and defended, payments to be postponed or installed, according to the state of the fund, and perhaps if the estate should be discovered to be insolvent, a distribution to be made among the creditors in equal degree, *pari passu*. These and many other subordinate powers, though not expressly given, as in the former part of the instrument, must be understood to be included in this power to pay debts; and I take it to be clear that in the construction of such powers they are included. Our books say that these kind of authorities are to be pursued strictly; they instance that an authority given to three cannot be executed by a less number than the whole, and the stat. of 21 H. 8. c. 4. was thought necessary to be made, to remedy the inconvenience arising from it in the case of executors, where some have declined to act. But our books also say, that they are to be so construed as to include all the necessary means of executing them with effect. Thus an authority to receive and recover debts includes a power to arrest.

rest. In such a case as the present, which is not that of mere ministerial authority capable of being defined and executed strictly, but a case where the whole care of the administration is delegated by the executrix to the attornies, and all the means of executing the office of executrix put into their hands, I am of opinion that both the particular provisions and the general words ought to receive the most liberal construction, which construction should, as far as possible, place the attornies where the executrix intended to place them, in her room and stead, invested with all her authority and with all her discretion. Assuming then that this authority to pay debts is larger and more comprehensive in its nature, than the words construed very strictly would import, and that it implies authority to make all necessary arrangements which the executrix herself might make, in order to the payment of the debts, I ask, among the arrangements which it may be necessary for an executrix, or for those to whom she has delegated all her authority touching the payment of the testator's debts, to make, is there one more likely to occur, more useful, in many cases more necessary, than that they should ask and obtain from the creditors of the estate time for payment of the debts, when the time given may prevent all the vexation and expence of a struggle for priority? That an executrix herself might make this arrangement, no one can doubt: that it is also necessary that they who are to have all the funds in their hands, who know, and are the only persons who can know within what time those funds can be got in, and who have the whole application of them entrusted to their care, who represent the executrix, and in effect are themselves the executors, should have it in their power to make it, is equally clear. The consequence of such an arrangement in either case, and indeed in every one of the instances which I before put, would be, that the executrix might by possibility become personally and in her own right chargeable with debts, as she might become chargeable in a variety of other cases expressly within the power of attorney. But upon whatever ground, and by whatever medium, in the instance of postponed debts, this personal charge is produced, the debt still remains a debt due from the estate, and payable out of the assets. Such an arrangement amounts to an admission, that at the expiration of the credit given, there will be
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assets sufficient to pay the debt, which still remains a charge upon the executrix as executrix, and only becoming eventually a charge upon her in her own right, if it should turn out that by some unforeseen event there should be a failure of assets, or by misconduct a *devastavit* incurred. If we are to argue from the intent of the instrument, to be collected from the particular wording of it, I ask, can it be reasonably doubted, whether this executrix, who trusted the whole of this large estate in the hands and to the care of these attornies, under her personal responsibility for every shilling of the amount of it, if they should fail in the collection or application of it, would have hesitated to commit to their discretion, upon their view of the state of the property, and of the time within which it could be realized, the asking and obtaining from the creditors twenty months further time for the payment of their respective debts? I ask whether the executrix did not mean to throw all the burden of the administration of the effects upon the attornies, and whether there was not a convenient and necessary discretion to be intrusted to them? When it is objected that the authority given is restrained to an authority to pay in her stead as executrix, and “*agreeably to the due order and course of law*,” I answer, that taking these words to amount to a direction to the attornies to pay in a course of administration, they were not meant to controul, nor can they controul the authority of the attornies in any thing necessary to that payment, in a course of administration. It is perfectly clear, notwithstanding this direction, that they might take time for the payment of the debts *having assets to pay them when the time came*, for then they would pay in a course of administration, and there can be nothing repugnant to that direction in asking for the time, even though the assets should afterwards fail, because it is a step taken upon a conviction that there will be assets to be administered in a due course of law, and to the end that they may be administered. Where the executrix has entrusted all to the care of her attornies, with a responsibility in herself to the extent of all the property, it is a small circumstance to be observed upon, that though the payment of a debt, not in a course of administration, is within the authority as between the creditor and the executrix, yet that she might be obliged to answer to other creditors as for a *devastavit* in respect of it.

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In truth, this direction to pay in a course of administration may operate as between her and her attornies, but as against creditors receiving payment of their debts it seems to me that it can have no operation. Much stress was laid in the argument on there being no express power given to the attornies to sign acceptances for the executrix, but the objection proves too much. As well might it be argued, that if the cash of the estate was kept at a banker's, the attornies should not draw for it in her name. The true question appears to me to be, whether the attornies under this power have a discretion to agree with creditors for the forbearance of the debts; and that the rest of the difficulty has more of form than substance in it. If the foundation is well laid, the application of the argument to the particular case in question seems obvious and decisive. The acceptance of this bill of exchange is called a security, but is in substance merely a mode of taking twenty months further time for payment of a debt, due from the testator to these Plaintiffs, and payable out of the assets. Had the twenty months credit been taken by a mere agreement to forbear, and she had been sued as executrix after the expiration of the time given, she could not have pleaded *plenè administravit*, because by taking the credit she admitted assets. There is a formal difference only between that case and the present, the acceptance appears upon the face of the bill to be an acceptance by her as executrix, and the consideration of it is value in account with testator. If she is sued in her own name, and not as executrix, she is so sued upon the same principle upon which assignees of a bankrupt are sued for what they do after they become assignees, for the estate, and at the expense of the estate. The debt is still substantially the debt of the testator, which when paid by her will be carried to the account of the testator's estate. I think she might have been sued as executrix upon this acceptance; but as she could not in that case have availed herself of a plea of *plenè administravit*, it was not necessary so to sue her. In neither case could any defence be made against the demand, and in truth no defence ought to be made, for the creditor who accepts this kind of payment purchases the benefit of it, the estate has had its advantage, and this Defendant as executrix has had her advantage of the forbearance. I have hitherto avoided any mention of the particular

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particular circumstances of this case, which very strongly imply the knowledge of the Defendant and her approbation of the making these acceptances (a), but here they ought to have their weight, by way of answer to the suggestion of possible inconvenience which the suffering this verdict to stand might produce. I confess that they appeared to me upon the trial, and do now upon the best consideration that I can give to the case, appear to me to be strong enough to raise an implication of a special procuration, if that were thought necessary, from the executrix to her attornies, to authorize these acceptances, and that the defence now made upon the strict law is against conscience and good faith. I have already taken an opportunity of observing on the case depending in the Court of King's Bench, and what I supposed would be the decision of that Court. I will only now repeat, that we understand that *it did not appear in that case, that the acceptance was given for the payment of a debt due from the testator (b)*, the payment of which had been agreed to be postponed, or indeed that it did in any manner touch or concern the execution of this trust, which is the great and distinguishing feature between that case and the present. We agree that this power cannot authorize the giving acceptances in the name of Mrs. Baillie, which are *neither expressed nor proved to be in payment of the testator's debts*. The case now in judgment in this

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(a) There was evidence to show that the Defendant knew that *Thorn-ton* had accepted the bill in question in her name, in payment of the Plaintiff's debt; and when the officer served her with process, she acknowledged the justness of the debt, saying that the Plaintiff had behaved handsomely, and should be paid. Perhaps therefore the case may rest with greater safety on the ground of a special authority given to accept the particular bill in question, than on the construction of an instrument, which demonstrates on the face of it the intention of the parties, that the power delegated to the procurator should not be extended to make the Defendant *personally* liable.

(b) In the course of the argument, it was stated that a similar question on the construction of the same letter

of attorney, was then depending in the Court of King's Bench : and a few days afterwards the Chief Justice said that he had been informed, that the question in the case in that court was, whether the attornies were authorized to give or accept bills generally in the name of the Defendant, not being in payment of the debts of the testator? This his lordship was clearly of opinion they could not do, under the letter of attorney, in which he apprehended the Court of King's Bench would concur.

That case is since reported, 6 Term Rep. B. R. 591. *Gardner v. Baillie*, but it is there stated that the bill on which that case arose *was drawn and accepted for a debt due to the Plaintiff from the testator*. Qu. therefore, how that fact really was?

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court rests on its own particular circumstances, upon which we decide.

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Rule discharged.

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The letter of attorney, after reciting the death of the testator, the making his will and appointment of executors together with the Defendant, who had alone proved the will, and taken upon herself the execution of it, and that the testator as trading under the firm of *James Baillie and Co.* and otherwise, was at the time of his death possessed of and entitled to very considerable sums of money owing to him upon mortgage bond and other specialties, bills, notes, unsettled accounts and otherwise, from persons residing in the islands of *Grenada, St. Christopher, St. Vincent*, and other islands in the *West Indies*, as also at *Demerary* in *America*, and in *Great Britain* and elsewhere, and was also possessed of and entitled to divers quantities of sugar, rum, cotton, coffee and other merchandize and effects in the said islands and places or some of them or elsewhere, went on as follows: “now know ye, that I the said *Colin Baillie*, for
“divers good causes and considerations me hereunto moving,
“have made, ordained, authorized, constituted and appointed,
“and by these premises do make, ordain, authorize, constitute and appoint *George Baillie* late of the island of *St. Vincent* aforesaid, esquire, now about to engage in business in *London*, as a merchant, and *Edmund Thornton*, late of the island of *Grenada*, aforesaid, Esquire, now also about to settle and reside in *London*, my true and lawful attorney and attornies jointly, and each of them severally, for me and in my name, place and stead, and to and for my use and benefit as *executrix* as aforesaid, to ask, demand, sue for, recover and receive of and from all and every or any person or persons whomsoever, all and every sum and sums of money, debts, dues, claims, demands, goods, chattels and effects whatsoever, which at the time of the death of the said *James Baillie* were due, owing or belonging to him, either as trading under the said firm of *James Baillie and Co.* or otherwise howsoever, and which now are or at any time or times hereafter shall or may be due, owing or payable to me, as *executrix* as aforesaid, or which were or are part of or belonging to the personal estate of the said testator, other than and except

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“ cept such part or parts thereof respectively as are specifically
 “ given and bequeathed in and by the said will, and also for
 “ me, and in my name, place and stead *as executrix as aforesaid*,
 “ to state, adjust, liquidate, settle and finally agree to all and
 “ every and any account and accounts, sum and sums of money,
 “ debts, dues, claims, demands, controversies, differences and dis-
 “ putes whatsoever, wherein the said James Baillie at the time of
 “ his decease was, or wherein I the said Colin Baillie as *execu-*
 “ *trix as aforesaid*, now am, or at any time or times hereafter,
 “ shall or may be in anywise interested or concerned. And also
 “ to refer or submit to arbitration the same, or any of them, or
 “ any part thereof, in all cases wherein my said attornies
 “ jointly, or either of them severally, shall find it necessary or
 “ expedient so to do, and for that purpose for and in my name,
 “ and as and for my act and deed or acts and deeds *as execu-*
 “ *trix as aforesaid*, to enter into, sign, seal, deliver and ex-
 “ cute such bond or bonds of arbitration, agreement or agree-
 “ ments, or other instrument or instruments in writing, as my
 “ said attornies jointly or either of them severally shall think
 “ proper, and upon payment or receipt of all or any such sum
 “ or sums of money, debts, dues, claims, demands, goods,
 “ chattels and effects, or other satisfaction to be had, taken, or
 “ received for the same or any part thereof, for me and in my
 “ name and as for my act and deed *as executrix as aforesaid*, to
 “ enter into and execute, make and give all and every or any
 “ such deeds, transfers or assignments of mortgage, counter-
 “ parts of mortgage, release, receipts, acquittances and dis-
 “ charges for the same respectively, as shall be necessary or
 “ proper; and in case of the non-payment or non-delivery
 “ thereof, or any part thereof respectively, for me the said
 “ Colin Baillie, and in my name, place and stead *as executrix*
 “ as aforesaid, either jointly with and in the names of the said
 “ Renè Payne, Archibald Hamilton, Walter Farquhar, Alex-
 “ ander Baillie and Evan Baillie, (the co-executors) in all cases
 “ wherein for conformity it may be necessary or proper to use
 “ their names, or separately in my own name, as the case may
 “ be or require, to appear, and the person of me their said
 “ constituent to represent, in all courts and before all ministers
 “ and magistrates of law and in equity, as well in the kingdom
 “ of Great Britain and the said islands of Grenada, St. Chris-
 “ topher

“ *topher and St. Vincent* aforesaid, as in all or any other islands
 “ in the *West Indies* and at *Demerary* aforesaid, or elsewhere
 “ as by my said attornies jointly or either of them severally
 “ shall be thought adviseable and proper; and to sue, arrest,
 “ attach, distrain, seize, sequester, prosecute to judgment and
 “ execution, and also to imprison and condemn, and out of
 “ prison again to release and discharge all and every or any
 “ person or persons whom it doth, shall, or may concern, his,
 “ her, their or any of their lands and tenements, negroes, slaves,
 “ cattle, stock, goods, chattels, and effects: *and also for me*
 “ *and in my name, place and stead, as executrix as aforesaid,*
 “ *and agreeably to the due order and course of law, to pay, dis-*
 “ *charge and satisfy all and every or any sum or sums of mo-*
 “ *ney, debts, dues, claims and demands whatsoever, which at the*
 “ *time of the death of the said James Baillie, were due and pay-*
 “ *able by him,* either as trading under the said firm of *James*
 “ *Baillie and Co.* or otherwise, and which now are or at any
 “ time or times hereafter shall or may become due and payable
 “ by me *as executrix as aforesaid,* whether upon mortgage,
 “ bond, bill, note or otherwise however, and to take such re-
 “ ceipt or receipts or other sufficient discharge or discharges
 “ for the same monies respectively as shall be necessary or
 “ proper, *and generally for me the said Colin Baillie as execu-*
 “ *trix as aforesaid, to make, do and execute all and every*
 “ *such further and other lawful and reasonable acts, deeds, matters*
 “ *and things whatsoever* for the better recovering, collecting,
 “ getting in, receiving and remitting all and singular the per-
 “ sonal estate and effects of the said testator, and *executing, per-*
 “ *forming and discharging all and every other the powers and au-*
 “ *thorities hereby given or intended to be given, as to my said at-*
 “ *tornies jointly or either of them severally shall seem meet,* I the
 “ said *Colin Baillie* giving, and by these presents granting unto my
 “ said attornies jointly and each of them severally, *my full and*
 “ *whole power and authority to do and act touching or concerning*
 “ *all or any of the premises aforesaid, as fully and effectually to*
 “ *all intents, constructions and purposes whatsoever, as I the said*
 “ *Colin Baillie as executrix as aforesaid, might or could do if*
 “ *personally present;* and one or more attorney or attornies
 “ substitute or substitutes under them the said *George Baillie*
 “ and *Edmund Thornton,* or either of them, for all or any of
 “ the purposes aforesaid, to make, and at their or either of
 “ their

1796.

 HOWARD
 against
 BAILLIE,

[626]

END OF MILITARY TERM.

AN
INDEX
TO
THE PRINCIPAL MATTERS.

A.

ACCORD.

See AGREEMENT, No. 19.

ACTION.

See AGREEMENT. ASSUMPSIT.
PLEADING. WARRANTY.

ACTION ON THE CASE.

1. If the owner of a house is bound to repair it, he, and not the occupier, is liable to an action on the case for an injury sustained by a stranger from the want of repair. *Payne v. Rogers*, Mic. 35 Geo. 3. vol. ii. page 349

ADMINISTRATOR.

See ASSUMPSIT, No. 26, 27. 29, 30.
COSTS, 15. 17. DISTRESS, 4. EX-
CUTOR.

ADMIRALTY.

1. A prize-act directs, that where ships, &c. are taken from the enemy and condemned as lawful prize in a court of Admiralty, and the sentence of condemnation appealed from, "execution of any sentence so appealed from as aforesaid, should not be suspended by reason of such appeal, in case the party or parties appellate should give *sufficient security*, to be approved of by the court, in which such sentence

"would be given, to restore the ship, &c. concerning which such sentence should be pronounced, or the *full value thereof*, to the appellant or appellants, in case the sentence so appealed from should be reversed." Though a security taken in a court of Vice-Admiralty, by virtue of this section of the act, is in the form of an *acknowledgment of a debt to the king*, yet not being in a court of record, it is not strictly a *recognizance*, but operates as a *stipulation* by the parties to abide the decision of the court of Appeals. Neither is the court of Appeals bound by this section to interpret the words "full value" by any *definite measure*, but they have a discretionary power of declaring what is *the full value*, and a power to enforce payment from the sureties of what they declare to be the *full value*. *Brymer and Others v. Atkins and Another*, Hil. 29 Geo. 3. i. 164

- N. B. The judgment in this case was affirmed by the court of King's Bench on a writ of error. *Mich. 30 Geo. 3.*
2. During the late war with the States General, a squadron of the king's ships having a detachment of the king's troops on board, were sent to attack a settlement belonging to the enemy, and secret instructions were given by his majesty to the commanders in chief, *that all the booty which should be gained by the joint operation*

operation of the army and navy, at the attack of the settlement, should be divided into two shares, between the land and sea forces. The attack was not made, but the squadron, while the troops were on board, took as prize a ship and cargo belonging to the enemy, in an open unfortified bay, at a distance from the destined object of attack. This ship and cargo being condemned as lawful prize, the produce was to be distributed according to the provisions of the prize-act, 21 Geo. 3. c. 15. The court of C. P. held that under that act a legal right was vested in the officers and crews of the squadron to their respective shares, on the condemnation. And the Lords Commissioners of Appeals from the Admiralty having issued a monition to the prize agent, to bring in the proceeds which were in his hands, a prohibition was granted to that court by the court of C. P. because they considered the monition as contrary to the legal vested right. *Home v. Earl Camden and others*, Trin. 30 Geo. 3. i. 476

N. B. The judgment in this case was reversed on a writ of error, by the court of King's Bench, Mic. 32 Geo. 3. 4 Term Rep. B. R. 382.

And the judgment of the court of K. B. was affirmed in the House of Lords. ii. 533

See title PROHIBITION, No. 4, 5, 6, 7.

3. During the late war with Spain, a flag-officer on a certain station, gave orders to a ship under his command to sail on a cruize. After the orders were given, but before a prize was taken, he accepted a command on another station, but no flag-officer was appointed to succeed him on his former station. He was not entitled to one-eighth of a prize taken by the ship which sailed in consequence of his orders, under the proclamation which issued for the distribution of prizes. *Johnstone, executor of Johnstone, v. Margetson*, Trin. 29 Geo. 3. i. 261

4. Where a ship belonging to a squadron under the command of an ad-

miral, sails by his orders on a cruize, but before any prize is taken he is superseded in his command by another admiral, and afterwards a prize is taken by the ship which so sailed; though it should be doubtful to which of the admirals the share of admiral would belong; clearly the captain of the ship taking the prize is not entitled to it. *Taylor v. Lord H. Pawlett, coram Lord Mansfield, Nisi Prius, A. D. 1759.* i. 264. n.

5. But under such circumstances, the admiral who succeeds to the command, (i. e. who is actually in command at the time when the prize is taken) is intitled. *Pigot v. White, East. 25 Geo. 3. B. R.* i. 265. n.

ADVOWSON.

1. The royal prerogative of presenting to a church vacant by the incumbent being promoted to a bishoprick, does not wholly destroy the effect of a prior grant of the next presentation, by the owner of the advowson: but the grantee shall have the right of presentation on the vacancy next after the presentation by the crown. *Calland v. Troward*, Trin. 34 Geo. 3. ii. 324

N. B. The judgment in this cause was affirmed by the court of B. R. on a writ of error. See 6 Term Rep. B. R. 439; and the judgment of the Court of B. R. affirmed in the House of Lords.

AFFIDAVIT.

See LOTTERY, No. 1, 2. PRACTICE, No. 11, 12. RECOVERY, No. 2, 3. REQUESTS, COURT OF, No. 3, 4.

1. An affidavit to hold to bail must shew how the debt arose. *Cooke v. Dobree*, East. 28 Geo. 3. i. 10
2. An affidavit that the defendant is indebted to the plaintiff "in the sum of £— and upwards," is not sufficient to hold to bail. i. *ibid.*
3. Where such defective affidavit is made, the court will not permit a supplemental one. i. *ibid.*
4. An affidavit to hold to bail, stating, that the defendant is indebted to the plaintiff

plaintiff "*in trover*" is bad. *Hubbard v. Pacheco, East. 19 Geo. 3.*

i. 218

5. Where a prisoner has been brought up to be discharged under the lords' act, and upon his examination the court have refused to discharge him, they will not afterwards discharge him on that act, though he make an *affidavit* of circumstances in answer to the cause before shown on his examination, against his discharge, and that the circumstances were not *then* disclosed, by *mistake*. *Thornton and Another v. Dumphy, Hil. 28 Geo. 3.*

i. 101

6. A bond was given conditioned for the payment of bills of exchange drawn in *England* on *A.* in the *East Indies*, in case such bills should be returned to *England* protested for non-payment. The *affidavit* to hold the obligor to bail, after stating, "that he was indebted to the deponent the obligee in a certain sum," stated also the condition of the bond, and "that the said bills were not paid to his knowledge or belief in *India*, or elsewhere, but that they were *tested for non-acceptance* in *India*, and were still unpaid." It was no objection to this *affidavit*, that it was stated that the bills were unpaid to the knowledge and belief of the plaintiff; but it was *bad* because it introduced a *new term* not mentioned in the condition of the bond, *viz.* a protest for non-acceptance. *Hobson and Another v. Campbell, Trin. 29 Geo. 3.*

i. 245

7. But the plaintiff might have filed a supplemental *affidavit*. *Ib.* i. 249

8. To support, in the next term after that in which issue is joined, a rule for judgment as in case of a nonsuit for not proceeding to trial, the *affidavit* must state that issue was joined *early enough* in the preceding term for the plaintiff to have proceeded to trial in that term. *Woulfe v. Sholls, Trin. 22 Geo. 3.*

i. 282

9. But in the third term, a general *affidavit*, stating that issue was joined in the former term, is sufficient. i. *ibid.*

10. In an action of debt for non-residence, on *stat. 21 Hen. 8. c. 13.* an *affidavit* that the offence was committed in the county where, and a year before the action is brought, is *not necessary*; the *stat. 21 Jac. 1. c. 4. s. 3.* not being applicable to such action. *Balls qui tam v. Atwood, clerk. Hil. 31 Geo. 3.*

i. 546

11. The court will not grant leave to amend a recovery on *affidavit only*. *Pearson v. Pearson and Another, Mic. 29 Geo. 3.*

i. 73

AGREEMENT.

See ASSUMPSIT. SEAMAN'S WAGES, No. 1.

1. The statute of frauds will prevent a parol agreement to buy goods, without either earnest or delivery, from giving the buyer any property in them. In such case therefore, the buyer cannot maintain *trover* against the vendor who sells them to another person. *Alexander v. Comber, Trin. 28 Geo. 3.*

i. 20.

2. WILSON, J., thought that where a sale is not *immediate*, it is not within that statute. But see No. 17. i. *ibid.*

3. Where the defendants, under a consolidation rule, have agreed not to bring *any writ of error*, they cannot do so, though there be manifest error on the record. *Camden and Others v. Edie, Trin. 28 Geo. 3.*

i. 21

4. *A., B., C. and D.* enter into an agreement jointly to purchase goods in the name of *A.* only, and each to take *aliquot* shares; but it does not appear that they agree *jointly to resell* the goods. On the failure of *A.* the ostensible buyer, *B., C. and D.* are not answerable to the seller as partners. *Coope and Others v. Eyre and Others, Trin. 28 Geo. 3.*

i. 37

5. *A.* the owner of a ship, executes an *absolute bill of sale* of it to *B.*, and by another deed of the same date, assigns other property to *B.*, which deed of assignment (reciting that the bill of sale was for the better securing a sum of money lent by *B.* to *A.* and also reciting a bond and warrant of attorney to secure the same sum) declares

- declares that those "several deeds
"and instruments were made to en-
"able *B.* by sale of *all the things*
"comprised in them, to raise the
"sum lent without the concurrence
"of *A.* at any time before the money
"should be paid off;" but in this
deed there is a covenant that upon
repayment of the money "*B.* shall
"reconvey to *A.* but so as not to pre-
"vent *B.* from selling, &c. at any
"time before the full payment, &c."
Under these conveyances, *B.* is not
absolute owner of the ship, but only
mortgagee; and therefore is *not liable*
for necessities provided for the ship
before he takes possession. *Jackson v.*
Vernon, Hil. 29 Geo. 3. i. 114
6. The mortgagee of a ship cannot
maintain an action for freight against
a third person, before he takes pos-
session. *Chinnery v. Blackburne,*
B. R. East. 24 Geo. 3. i. 117. n.
7. A tradesman delivers goods to *A.*
at the request and on the credit of *B.*
who says before the delivery, "*I*
"will be bound for the payment of the
"money as far as 800*l.* or 1,000*l.*"
This promise of *B.* not being in
writing, is void by the statute of
frauds, if it appear that *credit was*
given to A. as well as B. *Anderson v.*
Hayman, Hil. 29 Geo. 3. i. 120
8. *A.* a general merchant undertakes
voluntarily, without any reward, to
enter a parcel of goods belonging to
B. together with a parcel of his own
of the same sort at the custom-house
for exportation, but makes the entry
under a wrong denomination, by
means of which both parcels are
seized. *A.* having taken the same
care of the goods of *B.* as of his own,
not having received any reward, and
not being of a profession or employ-
ment which necessarily implied skill in
what he had undertaken, is not liable
to an action for the loss sustained by
B. *Shields and Another v. Black-*
burne, Hil. 29 Geo. 3. i. 158
9. In an action for the penalty of the
stat. 12 Anne, c. 16. the declaration
stated a specific sum of money to
have been lent, (in which the usury
consisted,) but the evidence was, that
the loan was part in money and part
in goods, (i. e. *gold*) of a known
definite value which the party re-
ceiving the loan *agreed to take as cash.*
This was good evidence to support
the declaration. *Barbe qui tam v.*
Parker, Mic. 30 Geo. 3. i. 283
10. Where a carrier gives notice by
printed proposals, that he will not
be answerable for certain valuable
goods, if lost, "*of more than the*
"value of a sum specified, unless ex-
"tered and paid for as such;" and
valuable goods of that description are
delivered to him by *A.* who knows
the conditions, but concealing the
value pays no more than the ordinary
price of carriage and booking; on a
loss happening, the carrier is *neither*
liable to the extent of the sum speci-
fied, nor to repay the sum paid for
carriage and booking. *Clay v. Wil-*
lan and Another, Mic. 30 Geo. 3.
i. 298
11. *A.* being possessed of an office in a
dock-yard, *B.* in order to induce
him to procure himself to be super-
annuated, and retire on the usual
pension, agrees (without the know-
ledge of the navy Board, to whom
the appointment belongs) in case *B.*
should succeed him in the office, to
allow him a certain annual share of
the profits. *A.* retires, *B.* is ap-
pointed to succeed him, but does not
perform the agreement. *A.* can
maintain *no action against B. on the*
agreement. *Parsons v. Thompson,*
Hil. 30 Geo. 3. i. 322
12. *A.* by the interest and on the ap-
plication of *B.* to the lords of the
treasury, is appointed customer of a
port, having previously entered into
an agreement, declaring that his
name was used in the application in
trust for *B.* that he would appoint
such deputies as *B.* should nominate,
and would empower *B.* to receive
the profits of the office to his own
use. On the failure of *A.* to comply
with the agreement, *no action upon it*
will lie against him. *Garforth v.*
Fearon, Mic. 27 Geo. 3. i. 327

13. A contract made by two partners to pay a certain sum of money to a third person, *equally out of their own private cash*, is a joint contract, and they must be jointly sued upon it. *Byers v. Doby, East. 29 Geo. 3.*

i. 236

14. *A.* being indebted to *B.* for brokerage, and *B.* indebted to *C.* for money lent, *B.* gives an order to *A.* to pay to *C.* the sum due from *A.* to *B.* as a security, on which *C.* lends *B.* a farther sum; and the order is accepted by *A.* On the refusal of *A.* to comply with the order, *C.* may maintain an action against *A.* for money had and received. *Israel v. Douglas and Another, East. 29 Geo. 3.*

i. 239

15. The purchaser of lands having brought an ejectment against the tenant from year to year, the parties enter into an agreement that judgment shall be signed for the Plaintiff with a stay of execution till a given period. The tenant cannot in the interval remove buildings, &c. (*ex. gr.* a wooden stable, moveable on blocks or rollers,) from the premises which he had himself erected during his term, and before the action was brought. *Fitzherbert v. Shaw, Trin. 29 Geo. 3.*

i. 239

16. *A.* being possessed of a quantity of land in a common field, and having a right of common over the whole field, and *B.* having also a right of common over the whole field, they enter into an agreement for their mutual advantage not to exercise their respective rights for a certain term of years. If during the term, the cattle of *B.* come upon the land of *A.*, he may distrain them damage-feasant. *Whiteman v. King, Mic. 32 Geo. 3.*

ii. 4

17. *A.* and *B.* enter into a verbal agreement for the sale of goods, to be delivered to *A.* at a future period. There is neither earnest paid, a note or memorandum in writing signed, nor any part of the goods delivered. This agreement is void by the statute of frauds, though executory, and though it has been admitted by *B.* in

his answer to a bill in Chancery filed by *A.* *Rondeau v. Wyatt, Trin. 32 Geo. 3.*

ii. 63

18. *A.* and *B.* ship-agents at different ports, enter into an agreement to share in certain proportions the profits of their respective commissions, and the discount on tradesmen's bills employed by them in repairing ships, &c. By this agreement, they become *liable as partners* to all persons with whom either contracts as such agent, though the agreement provides that neither shall be answerable for the acts or losses of the other, but each for his own. *Waugh v. Carver, Mic. 34 Geo. 3.*

ii. 235

19. *A.* declared that in consideration that he at the request of *B.* had consented and agreed to accept and receive from *B.* a composition of so much in the pound upon a sum of money owing from *B.* to *A.* in full satisfaction and discharge of the debt, *B.* promised to pay the composition. This was not a good consideration to maintain an assumpsit against *B.* a mere accord not being a ground of action. *Lynn v. Bruce, Trin. 34 Geo. 3.*

ii. 317

AMENDMENT.

See PRACTICE, No. 22.

1. The court will not grant leave to amend a recovery, unless it appear on the face of the deed to lead the uses, that there is sufficient ground for an amendment. *Pearson v. Pearson and Another, Mic. 29 Geo. 3.*

i. 73

2. Where in a plea by an executor of a former judgment recovered, by mistake a less sum is stated than the judgment was really for, if it clearly appear that a greater sum was recovered, the court will permit the defendant to amend the record by inserting the real sum in the plea, though the application be not made for the amendment till a considerable time (*ex. gr.* near three years,) after the record has been made up: but in such case they will allow the plaintiff to reply *per fraudem*. *Skutt v.*

x x

Woodward,

Woodward, Executrix of Woodward, East. 29 Geo. 3. i. 238

3. Where a *fi. fa.* is sued out into a different county from that in which the *venue* is laid, and the party suing it afterwards takes out a *fi. fa.* into the proper county, and gets a return of *nulla bona* to warrant the *fi. fa.* which first issued, the court will permit the first writ to be amended by adding the return of *nulla bona* and the *testatum* clause, though the second writ be returnable several days before judgment was signed. *Meyer v. Ring, Hil. 31 Geo. 3.* i. 541

4. The court would not after demurrer, permit the declaration to be amended in an action of covenant brought against executors in their own right, who had merely acted in the disposition of the testator's effects. *Noble v. King and Another, Trin. 28 Geo. 3.* i. 37

5. After a party has once amended on a demurrer, the court will not give him leave to amend again on a second demurrer. *Kinder v. Paris, Mic. 36 Geo. 3.* ii. 561

AMERICA.

1. *A.* and *B.* being inhabitants of the United States of *America*, while those States were colonies of *Great Britain*, and before the war broke out between the two countries, *B.* executes a bond to *A.* During the war, but after the declaration of independence by the Congress, both parties were attainted, their property confiscated and vested in the respective States of which they were inhabitants, by the legislative acts of those States, and a fund provided for the payment of the debts of *B.* in *America*. *A.* may maintain an action on the bond against *B.* in *England*. *Folliott v. Ogden, Hil. 29 Geo. 3.* i. 123
2. The several acts of attainder and confiscation were passed by *Sovereign Independent States*. *Ibid* and *infra* 5. *Wright v. Nutt and Another.* i. 149
3. It is not a good plea in bar of the action at law, that an ample fund was provided out of the effects of *B.* in

America for the payment of his debts, to which *A.* might and ought to have resorted, and out of which he might have been paid. i. 149

4. But that is a good ground for relief in equity. i. *ib.*

5. Accordingly, an injunction was granted by the Court of Chancery, to prevent execution being taken out on a judgment obtained in an action at law on a promissory note, the circumstances of which resembled those of the case of *Folliott v. Ogden. Wright v. Nutt and Another, in Canc. Hil. 28 Geo. 3.* i. 136

6. The penal laws of foreign countries are strictly local, and affect nothing more than they can reach, and can be seized by virtue of their authority. *Folliott v. Ogden, (supra, l.)*
N. B. The judgment in this case was affirmed by the Court of King's Bench on a writ of error, *Trin. 30 Geo. 3.* but on grounds different from those on which the Court of Common Pleas proceeded. See 3 *Term Rep. B. R.* 176.

ANNUITY.

1. Judgment being entered on a bond to secure the quarterly payment of an annuity, and a *fi. fa.* having issued for the arrears of the preceding half year, a second *fi. fa.* may be taken out for the arrears of the next quarter, without reviving the judgment. *Scott v. Whalley, Mic. 30 Geo. 3.* i. 297
2. The memorial of an annuity must set forth precisely the manner in which the consideration money was paid, according to *stat. 17 Geo. 3. c. 26.* *Kirkman v. Price, Hil. 30 Geo. 3.* i. 309
3. *Quære*, Whether the consideration were a good one, which consisted partly of money paid at the time, and partly of securities for money before advanced, then given up? *ib.*
4. The full pay of a military officer cannot be assigned (by way of annuity or otherwise). *Barwick v. Reade, East. 31 Geo. 3.* i. 627
5. *A.* grants an annuity for his own life to *B.* to secure which a bond and warrant

warrant are given, and judgment entered. *B.* dies; *after his death* the court will not admit evidence of a parol agreement between the parties, that *A.* should be at liberty to redeem the annuity on certain terms, (especially if it be the evidence of the attorney concerned,) as a ground to order the securities to be given up, and satisfaction entered on the judgment. *Haynes v. Hare, Trin. 31 Geo. 3.* i. 659

6. Where a warrant of attorney has been given to confess a judgment, to secure an annuity, together with other securities, the memorial must state the warrant of attorney as well as the other securities. *Davidson v. Lord Foley, Mic. 32 Geo. 3.* ii. 12

7. In this respect there is no difference, whether the annuity were granted before or after passing the stat. 17 Geo. 3. c. 26. ii. *ib.*

8. *A.* grants an annuity to *B.* the whole of which *B.* assigns to *C.* There being a memorial enrolled of all the original securities, it is not necessary that there should be also one of the assignment. *Dixon v. Birch, East, 34 Geo. 3.* ii. 307

9. A fine levied of a rent charge assigned by way of annuity, will not give the Court of Common Pleas jurisdiction to set aside the annuity on account of a defective memorial, there being neither a warrant of attorney to enter nor judgment actually entered in that court. *Craufurd v. Caines, Hil. 35 Geo. 3.* ii. 438

ARREST.

1. All persons who have relation to a cause which calls for their attendance in court, whether they are compelled to attend by process or not, are intitled to privilege from arrest *eundo et redeundo*, provided they come *bonâ fide*. *Meekins v. Smith, East. 31 Geo. 3.* i. 636

2. In which description *bail* are included. i. *ib.*

3. And *barristers* upon the circuit. i. *ib.*

4. If a person be arrested after the

writ is returnable, the officer cannot legally detain him though for the shortest time, till the writ be renewed. *Loveridge v. Plaistow, East 32 Geo. 3.* ii. 29

ASSUMPSIT.

See AGREEMENT.

1. An auctioneer employed to sell the goods of a third person by auction, may maintain an action for goods sold and delivered against a buyer though the sale was at the house of such third person, and the goods were known to be *his* property. *Williams v. Millington, Mic. 29 Geo. 3.* i. 81

2. The indorsee of a bill of exchange having received part of the contents from the drawer, cannot recover more than the residue from the acceptor. *Bacon v. Searles, Mic. 29 Geo. 3.* i. 88

3. Where the drawer pays the whole, the acceptor is entirely discharged. i. *ib.*

4. A bill of exchange having been refused payment by the acceptor when due, is returned to, and taken up by the drawer. It cannot afterwards be negotiated by the drawer. *Beck v. Robley, Trin. 14 Geo. 3. B. R.* i. 89. n.

5. On a dissolution of a partnership between *A.*, *B.* and *C.* a power given to *A.* to receive all debts owing to, and to pay all those owing from the late partnership, does not authorize him to indorse a bill of exchange in the name of the partnership, though drawn by him in that name, and accepted by a debtor to the partnership after the dissolution. The person therefore to whom he so indorses it, cannot maintain an action on it against *A.*, *B.* and *C.* as partners. *Kilgour v. Finlyson and Others, Hil. 29 Geo. 3.* i. 155

6. Neither can such indorsee maintain an action against *A.*, *B.* and *C.* for money paid to the use of the partnership, though in fact the money advanced by him in discounting the bill be applied by *A.* to the payment

x x 2 of

- of a debt due from the partnership.
i. 155
7. *A.* having signed his name to a blank paper duly stamped, and delivered it to *B.* for the purpose of drawing a bill of exchange in such manner as *B.* should think fit, *B.* draws a bill payable to a *fictitious payee or order*, and indorses it for a valuable consideration to *C.*, who is ignorant of the transaction between *A.* and *B.* *C.* may maintain an action against *A.* as the drawer of a bill payable to bearer on a count to that effect. *Collis and Others v. Emmett*, Hil. 30 Geo. 3. i. 313
8. Or *C.* may recover on a count stating the special circumstances.
i. *ib.*
9. If a bill of exchange be drawn in favour of a *fictitious payee or order*, with the knowledge of the acceptor as well as the drawer, and the name of such fictitious payee be indorsed on it by the drawer with the knowledge of the acceptor, which fictitious indorsement purports to be to the drawer himself or his order, and then the drawer indorses the bill to an innocent indorsee for a valuable consideration, and afterwards the bill is accepted, but it does not appear that there was an intent to defraud any particular person; such innocent indorsee for a valuable consideration may recover against the acceptor as on a bill payable to bearer. *Gibson and Johnson v. Minet and Fector*, Hil. 31 Geo. 3. in the House of Lords, in error. i. 569
10. Perhaps also in such case the innocent indorsee might recover against the acceptor as on a bill payable to the order of the drawer. i. *ib.*
11. Or on a count stating the special circumstances. i. *ib.*
12. Where there is a promise to pay a bill of exchange within a fixed time, if during that time no proof be brought of its being already paid, though the promise be broken, (no such proof being brought within the time,) and in an action on the bill with an *insimul computassent*, the plaintiff gives evidence under the *insimul computassent* of the special promise, yet the defendant may prove also under that count that the debt for which the bill was originally given, was paid, and thereby avoid the promise by shewing that it was without consideration. *Elmes v. Will*, Trin. 28 Geo. 3. i. 64
13. Where a husband goes abroad leaving his wife in this country, who dies in his absence, a third person who voluntarily pays the expences of her funeral, (suitable to the rank and fortune of the husband,) though without the knowledge of the husband, may recover from him the money so laid out; especially if such third person be the father of the wife. *Jenkins v. Tucker*, Mich. 29 Geo. 3. i. 90
14. *Quære*, Whether such third person can recover from the husband money which he has expended in discharging debts which she had contracted during the husband's absence? i. *ib.*
15. *Quære*, Whether the defendant can demur to the evidence after paying money into court? i. *ib.*
16. An *insimul computassent* with an administrator as such of money due from the intestate, does not make him personally liable. *Secar v. Atkinson, Administratrix of Atkinson*, Hil. 29 Geo. 3. i. 102
17. An executor cannot be charged as such either for money had and received by him, money lent to him, or on an account stated of money due from him as such; those charges making him personally liable. *Rose d Ux. v. Bowler and Another, Executors of Bowler*. Hil. 29 Geo. 3. i. 108.
18. The wife can only join with her husband in bringing an action where she is the meritorious cause of action; *ex. gr.* where a legacy is left to her. i. *ib.*
19. *Quære*, Whether an action will lie against executor as such, for a legacy left by the testator, in which it would be unnecessary to aver assets, and he might plead *plene administravit*? i. *ib.*
20. But

20. But *quære* also, whether an action will not lie against an administrator *as such*, on an express promise to pay a legacy in consideration of assets, in which he may plead *non assumpsit*? *Lewis v. Lewis, Sittings at Westminster after Trin. 18 Geo. 3. coram Lord Mansfield.* i. n. 111
21. Money paid for insuring tickets in the lottery, may be recovered back from the keeper of the office, in an action for money had and received. *Jacques v. Whitby and Another, Trin. 28 Geo. 3.* i. 65
22. A contract declared by a statute to be illegal, is not made good by a subsequent repeal of the statute. i. *ib.*

ATTACHMENT of Contempt.

See PRACTICE.

1. Though the rule to bring in the body has expired, yet if bail be justified before an attachment against the sheriff is moved for, it is in time to prevent an attachment. *Thorold v. Fisher, East. 28 Geo. 3.* i. 9
2. The court will not grant an attachment against a witness, for disobeying a *subpœna* to attend at a trial, unless the *whole expences* of the journey and of the necessary stay at the place of trial, be tendered at the time of serving the *subpœna*. *Fuller v. Prentice, Trin. 28 Geo. 3.* i. 49
3. Although an exception to bail has been regularly entered, and the defendant's attorney having had a *verbal* notice of it, proceeds by giving notice of justification, and attempting to justify; yet a notice *in writing* of such an exception is necessary, in order to make the *sheriff liable to an attachment* for not bringing in the body. *Cohn v. Davis, Mic. 29 Geo. 3.* i. 80
4. A corporation to whom a writ is directed, cannot *be attached for contempt* in their corporate character, for not returning it. But an *attachment* in the nature of a *pore* is the proper remedy to compel them to appear. *Corporation of London v.*

- the Corporation of Lynn, East. 29 Geo. 3.* i. 207
5. The court will not discharge an attachment against a sheriff for not bringing in the body, except upon payment of the *whole debt due, and costs beyond the sum sworn to and indorsed on the writ.* *Fowlds v. Mackintosh, East. 29 Geo. 3.* i. 233
6. The court will not discharge an attachment against a sheriff for not returning a writ of execution, except upon payment of the *whole debt and costs*, and the costs of the application, where there are circumstances attending the transaction which induce a suspicion of fraud. *The King on the prosecution of Bond v. the Sheriff of Middlesex, Hil. 31 Geo. 3.* i. 543
7. An action on the case on the *stat. 23 Hen. 6. c. 9.* will not lie against sheriff for refusing to take bail on an attachment out of Chancery. *Studd v. Acton, Trin. 30 Geo. 3.* i. 468
8. A sheriff who is ruled on the last day of term to bring in the body, but goes out of office before the next term, is liable to an attachment for not bringing in the body. *Meekins v. Smith, East. 31 Geo. 3.* i. 629

ATTACHMENT, Foreign.

See BANKRUPT, No. 14.

1. If a plea of foreign attachment state the custom to be, "that if any person be or hath been indebted to any other person within the city," &c. it ought to shew that the defendant in the plaint was indebted to the plaintiff within the city. *Morris v. Ludlam, Mic. 35 Geo. 3.* ii. 362
2. *A., B. and C.* being partners in England, *A. and B.* reside in England: and *C.* goes to a foreign country for the purpose of managing the affairs of the house in that country. *D.* is also resident in England, where a debt is contracted by *D.* to *A., B. and C.* *D.* becomes insolvent, and *C.* knowing that *D.* has stopped payment, and after a commission of bankrupt has in fact issued against *D.,*

D., attaches in the names of himself and his partners, a debt due to *D.* in the foreign country, by legal process, and obtains payment of it under the judgment of a court of justice in that country; the assignees of *D.* have a right to recover the money so received by *C.*, in an action against *A.*, *B.* and *C.*, for money had and received to the use of the assignees. *Philips v. Hunter, in the Exchequer Chamber, in error, Hil. 35 Geo. 3.*

ii. 402

ATTORNIES.

See COSTS, No. 28.

1. The lien which an attorney has on the costs, is subject to the equitable claims of the parties in the cause. *Schoole v. Noble and Others, Trin. 28 Geo. 3.* i. 23
2. An attorney has a lien for his bill on money levied by the sheriff under an execution on a judgment recovered by his client, and is entitled to have it paid over to him, notwithstanding the sheriff has notice to retain the money in his hands, and that the court would be moved to set aside the judgment; and notwithstanding a *docket* has been struck against the client becoming a bankrupt. *Griffin v. Eyles, Hil. 29 Geo. 3.* i. 122
3. A solicitor in Chancery may practise in the equity side of the Exchequer, without being admitted a solicitor in that court. *Meddowcroft v. Holbrooke, Trin. 28 Geo. 3.* i. 50
4. Neither an attorney, nor an articulated clerk to an attorney, can be bail to the action. *Laing v. Cundale, Mic. 29 Geo. 3.* i. 76
5. After verdict the court will not compel an attorney to discover the place of abode of his client. *Hooper v. Harcourt, Mic. 31 Geo. 3.* i. 534
6. Before an attorney can bring an action for his bill, he must leave the bill with his client, according to *stat. 2 Geo. 2. c. 23.* *Brooks v. Mason, Mic. 30 Geo. 3.* i. 290

7. A clerk to an attorney, though not articulated, cannot be bail to the action. *Cornish v. Ross, Mic. 35 Geo. 3.* ii. 350

8. *A.* having obtained a verdict against *B.* for a small sum, and *B.* having previously recovered judgment against *A.* for a larger sum, and taken him in execution, the court will permit the sum recovered by *A.* by the verdict and the costs to be deducted from the amount of the judgment of *B.* and satisfaction to be entered for so much, notwithstanding *A.* is insolvent, and has no means of paying his attorney's bill, but by the sum for which he obtained the verdict. *Vaughan v. Davies, Hil. 35 Geo. 3.* ii. 440

9. *S.P. Dennie v. Elliott, Mic. 36 Geo. 3.* ii. 587

10. To maintain an action by one attorney against another, for business done by the plaintiff for the defendant, before the defendant became an attorney, it is not necessary for the plaintiff to leave his bill signed with the defendant, according to the directions of the *stat. 2 Geo. 2. c. 23. s. 23.*, the *stat. 12 Geo. 2. c. 13.*, applying to the case of both parties being attorneys when the action is brought. *Ford v. Maxwell, Hil. 36 Geo. 3.* ii. 589

AUCTIONEER.

See ASSUMPSIT, No. 1. EVIDENCE, No. 3.

1. *Qu.* Whether the selling goods by auction within the city of London, by an auctioneer who has paid the duty of 20s. for a licence required by the *stat. 17 Geo. 3. c. 50.*, but who has not been admitted as a broker by the court of the mayor and aldermen, makes him liable to the penalty of the 6 Anne, c. 16. for acting as a broker without being so admitted? *Wilkes v. Ellis, Mic. 36 Geo. 3.* ii. 555
2. *Semb.* That it does not. ii. ib.

BAIL.

B.

BAIL.

See AFFIDAVIT, No. 1, 2, 3. 5, 6. ATTACHMENT OF CONTEMPT, No. 1. 3. ATTORNIERS, No. 3. PRACTICE, No. 11.

1. The court will set aside proceedings against bail, if the *ca. sa.* be tested of a term prior to that in which judgment is signed against the principal. *Gawler v. Jolley, Mic. 29 Geo. 3. i. 74*
2. Bail to the sheriff are liable, *beyond the sum sworn to and costs*, to satisfy the whole debt due, to the full extent of the penalty of the bail bond. *Mitchell and Others v. Gibbons, Mic. 29 Geo. 3. i. 76*
3. Bail must actually have become such before notice of justification is given. *Collier v. Godfrey, Mic. 29 Geo. 3. i. 291*
4. Where bail are put in *in due time*, the defendant is not bound to give notice, but the plaintiff must search in the filazer's book. Otherwise, if they be not put in *in due time*. *Dawkins v. Reid, Mic. 31 Geo. 3. i. 529*
5. A variance between the writ and count (the *ac etiam* being in case of promises, but the declaration in *debt*), is not a ground for entering an *exoneretur* on the bail piece, where the sum sworn to is under 40*l.* *Lockwood v. Hill, Hil. 30 Geo. 3. i. 310*
6. Though a rule to bring in the body has been served, bail may render the defendant without justifying. *Hall v. Walker, East. 31 Geo. 3. i. 638*
7. The sheriff may sue on a bail bond in a different court from that in which the original action was. *Newman & al. v. Faucitt, East. 31 Geo. 3. i. 631*
8. Where a certificated bankrupt has been holden to bail for a debt due before his bankruptcy, the court will not discharge him on entering a common appearance, if it appear that his certificate was obtained by fraud. *Vincent v. Brady, Mic. 32 Geo. 3. ii. 1*
9. If a married woman be holden to bail, the court will discharge her on

entering a common appearance. *Pritchett v. Cross, Hil. 32 Geo. 3. ii. 17*

10. Of the four days allowed to perfect bail in, after an exception, the first is reckoned inclusively, and the last exclusively. *North v. Evans, East. 32 Geo. 3. ii. 35*
11. So that where the exception was on *Wednesday*, the attachment could not regularly issue against the sheriff till the *Tuesday* following (*Sunday* being no day). *ii. ib.*
12. But though the attachment did issue on the *Monday* the court would not set it aside, because the bail were not perfected. *ii. ib.*
13. Bail sued on their recognizance by attachment of privilege, may render the principal on the appearance day of the return. *Fletcher v. Aingell, Mic. 33 Geo. 3. ii. 117*
14. Bail above may justify the breaking and entering a house (the outer door being open) in which the principal resides, in order to seek for him, for the purpose of rendering him. *Sheers v. Brooks, Mic. 33 Geo. 3. ii. 120*
15. Such a justification is good, without averring that the principal was in the house at the time. *ii. ib.*
16. And in such a plea an averment that the defendants *duly became bail and entered into a recognizance* is sufficient, without stating that the principal was delivered to their custody. *ii. ib.*
17. Though bail has not been put in in due time, the court will set aside an attachment against the sheriff, on payment of costs and perfecting bail, if the plaintiff has not been delayed. *Callan v. Tye, Mic. 34 Geo. 3. ii. 235*
18. An attachment against the sheriff is irregular, if the rule to bring in the body issues before the time for putting in bail has expired. *Rolfe v. Steele, Hil. 34 Geo. 3. ii. 276*
19. But if the sheriff neglect to apply to the court in due time, the irregularity is waived. *ii. ib.*
20. Where a writ is returnable on the first return of a term, in a country cause,

cause, the defendant has eight days after the *quarto die post* to put in bail.

ii. 276

21. The defendant having been holden to bail, but afterwards discharged on a common appearance, on account of the plaintiff having declared on a different cause of action from that mentioned in the writ and affidavit, may be holden to bail again in an action on the judgment. *De la Com v. Read*, Hil. 34 Geo. 3. ii. 278

22. A clerk to an attorney, though not articulated, cannot be bail to the action. *Cornish v. Ross*, Mic. 35 Geo. 3. ii. 350

23. A bond given to the sheriff, conditioned for the appearance of a person arrested by him on process issuing upon an indictment at the quarter sessions, is void. *Bengough v. Rossiter*, in the Exchequer Chamber, in error, Hil. 36 Geo. 3. ii. 418

24. Bail must render the principal before the rising of the court in order to discharge themselves from an action of debt on the recognizance. *Lardner v. Bassage*, Hil. 36 Geo. 3. ii. 593

BANKRUPT.

See BAIL, No. 8. ESTATE-TAIL, No. 1. USE AND OCCUPATION, No. 1.

1. Insuring in the lottery is not gaming within the *stat* 5 Geo. 2. c. 30. s. 12 which will prevent a bankrupt's certificate from being allowed. *Lewis v. Piercy*, Trin. 29 Geo. 3. i. 29

2. Where a debt arises before bankruptcy, but a verdict is obtained and costs taxed after, the costs are considered as part of the original debt, and the certificate extends to both. i. ib.

3. Under such circumstances therefore, the court will discharge a person out of custody who is in execution for the costs. i. 29

4. S. P. where the action was for words spoken of a man in his trade, and the defendant became a bankrupt between the verdict (which was for the plaintiff) and judgment. *Long-*

ford v. Ellis, B. R. East. 25 Geo. 3. i. n. ib.

5. The bankruptcy of the defendant cannot be pleaded in bar of an action of covenant for rent, on an express covenant. *Mills v. Auriol*, Trin. 30 Geo. 3. i. 433

N.B. The judgment in this case was affirmed by the Court of King's Bench on a writ of error. *Mic.* 30 Geo. 3. 4 Term Rep. B. R. 94.

6. But such plea is good to an action of debt for rent on the *reddendum* of a lease, whether the rent be due before or after the bankruptcy. *Wadham v. Marlow*, B. R. Mic. 25 Geo. 3. i. n. 437

7. It is not necessary that there should be an actual acceptance of rent by the lessor from the assignee of the lessee, to discharge the lessee from an action of debt on the *reddendum*. i. n. 437

8. Any assent of the lessor is sufficient for that purpose. i. ib.

9. An action of debt on the *reddendum* is founded, not merely on the terms of the demise, but also on the enjoyment of the lessee. i. ib.

10. Notice to the lessor of an assignment by the lessee, is not alone sufficient to exempt him from that action. i. ib.

11. Every man's assent is presumed to an act of parliament. i. ib.

12. The assignment therefore of a bankrupt's estate (a lessee) being by virtue of an act of parliament, is an assignment with the assent of the lessor. i. ib.

13. Where the defendant pleads the general plea of bankruptcy to an action brought by an executor or administrator, and obtains a verdict, the plaintiff is not liable to costs, on *stat.* 5 Geo. 2. c. 30. s. 7. *Martin & Ux. Administratrix of Norfolk v. Norfolk*. Mic. 31 Geo. 3. i. 528

14. A. draws a bill of exchange on B. in favour of C., who indorses it to D., who discounts it. Before the bill is due A. becomes a bankrupt and obtains his certificate. When the bill is due payment is refused; upon which C.

- C. refunds the money to D. which was advanced in discount, and takes back the bill. To an action brought by C. against A. on the bill, A. cannot plead his bankruptcy. *Brooks v. Rogers, East. 31 Geo. 3.* i. 640
15. If after an act of bankruptcy committed, but before an assignment, a creditor of the bankrupt makes an affidavit of a debt in *England*, by virtue of which he attaches, and receives, after the assignment, money due to the bankrupt in the *West Indies*, the assignees may recover the money, in an action for money had and received. *Sill and Others, Assignees of Skirrow, v. Worwick, Trin. 31 Geo. 3.* i. 665
16. A bond given to a creditor of a bankrupt, in order to induce him to withdraw a petition which he had preferred to the Chancellor against the allowance of the certificate, is void by the stat. 5 Geo. 2. c. 30. s. 7. *Sumner v. Brady and Others, Trin. 31 Geo. 3.* i. 647
17. If a bankrupt, after obtaining his certificate, promise to pay a prior debt when he is able, in a general *indebitatus assumpsit* brought on that promise, the plaintiff must prove the ability of the defendant to pay. *Besford v. Saunders, Trin. 32 Geo. 3.* ii. 116
18. A trader on the eve of bankruptcy makes a collusive sale of his goods to A., the assignees cannot maintain trover for them against A. without proving a demand and refusal. *Nixon v. Jenkins, East. 33 Geo. 3.* ii. 135
19. A certificated bankrupt is not a competent witness to prove the debt of the petitioning creditor, or any other fact necessary to support the commission. *Chapman v. Gardner, Hil. 34 Geo. 3.* ii. 279
20. S. P. *Cross v. Fox, in note.* ii. ib.
21. S. P. *Flower v. Herbert, in note.* ii. 279
22. The assignees of a bankrupt may recover from the winner money lost by the bankrupt before his bankruptcy, at play, in an action of debt on the stat. 9 Anne, c. 14. *Brandon v. Pate, East. 34 Geo. 3.* ii. 308
23. A tenant from year to year of a house at a yearly rent becomes a bankrupt in the middle of the year, and his assignees enter and keep possession for the remainder of the year. The lessor cannot maintain an action for use and occupation against the assignees, for the bankrupt's occupation as well as their own, without proving their special instance and request for the bankrupt to occupy, during the time that elapsed before the bankruptcy. *Naish v. Tatlock, Trin. 34 Geo. 3.* ii. 320
24. A. having recovered a verdict for a certain sum of money against B., B. commits an act of bankruptcy. Afterwards A., having had no notice of the bankruptcy, gives time to B., and instead of entering up judgment and suing out execution, takes a bill drawn by B. on C. at a distant period, for the amount of the sum recovered. This is not a payment protected by the stat. 19 Geo. 2. c. 32. A. therefore remains liable to refund the money received for the bill, to the assignees of B. *Pinkerton v. Marshall, Trin. 34 Geo. 3.* ii. 334
25. One of two makers of a joint and several promissory note having become a bankrupt, the payee receives a dividend under the commission on account of the note. This will prevent the other from availing himself of the Statute of Limitations, in an action brought against him for the remainder of the money due on the note, the dividend having been received within six years before the action brought. *Jackson v. Fairbank, Trin. 34 Geo. 3.* ii. 340
26. A. B. and C. being partners in trade in *England*, A. and B. reside in *England*, and C. goes to a foreign country for the purpose of managing the concerns of the house in that country. D. is also resident in *England*, where a debt is contracted by D. to A., B. and C. D. becomes insolvent, and C. knowing that D. has stopped payment, and after a commission of bankrupt has in fact issued against him, attaches in the name of himself and his

his partners, a debt due to *D.* in the foreign country, by legal process, and obtains payment of it under the judgment of a court of justice of that country. The assignees of *D.* have a right to recover the money so received by *C.* in an action against *A.*, *B.* and *C.* for money had and received to the use of the assignees. *Philips v. Hunter, in the Exchequer Chamber, in error, Hil. 35 Geo. 3.*

ii. 402

27. It is agreed between *A.* and *B.* that *B.* shall purchase of *A.* all the goods of a certain kind which *A.* shall send him, at a fixed price, and that *A.* shall draw bills on *B.* for the amount of the purchase, and also that *B.* shall accept other bills drawn by *A.* for his convenience, to cover which *A.* shall remit value to *B.* After they have acted some time under this agreement, *B.* becomes bankrupt, being under acceptances to a great amount. *A.* (being ignorant of the bankruptcy) sends a quantity of goods of the same kind, together with other bills to *B.* for the purpose of discharging those acceptances, which come into the hands of the assignees. *A.* afterwards himself discharges the acceptances. Under these circumstances, *B.* is to be considered as the *factor* or *banker* of *A.*, and as having only a *qualified property* in the goods and bills which were so sent for a particular purpose, the general property being in *A.* Therefore that purpose not being answered, *A.* may recover back from the assignees of *B.* the amount of those goods and bills. *Hollingworth v. Tooke, in the Exchequer Chamber, in error, East. 35 Geo. 3.*

ii. 501

28. The right to bring a *real* action passes to the assignees of a bankrupt, by the usual words of the deed of assignment. *Smith v. Coffin, East. 35 Geo. 3.*

ii. 444

29. The court will not discharge a defendant who is holden to bail for a debt contracted in this country, out of custody, on a common appearance, on an affidavit of his having become

a bankrupt in *Ireland*, and there obtained his certificate, but will put him to plead. *Quin v. Keefe, Mic. 36 Geo. 3.*

ii. 553

30. But a general plea of bankruptcy in *Ireland*, referring to an *Irish* act of parliament, and concluding to the country (in a mode similar to that given by *stat. 5 Geo. 2. c. 30. s. 7.* to bankrupts in *England*) is clearly bad.

ii. *ib.*

31. *A.* draws a bill of exchange on *B.*, payable to the order of *A.*, which *B.* accepts; and *B.* draws a bill on *A.*, payable to the order of *B.*, which *A.* accepts, for their mutual accommodation. Both bills are payable at the same time, have the same dates, and contain the same sums. One is a good consideration for the other, and neither is an indemnity; so that if either party becomes a bankrupt, the bill accepted by him may be proved under his commission, and consequently, to an action brought on it, his bankruptcy may be pleaded. *Rolfe v. Caslon, Mic. 36 Geo. 3.*

ii. 570

BARON AND FEME.

See ASSUMPSIT, No. 13. 18.

1. Where the defendant is joined with his wife in the writ, he may enter an appearance for himself only. *Clarke v. Norris et Ux. East. 29 Geo. 3.*

i. 235

2. And in such case the plaintiff cannot sign judgment for want of a plea without demanding a plea. *i. ib.*

3. Where a married woman lives apart from her husband, under articles of separation, by which he covenants "that she shall enjoy to her own use" "all such estates both real and personal, as shall come to her during" "the coverture, and that he will join" "in the necessary conveyances, to" "limit them to such uses as she shall" "appoint"; and *copyhold* lands having afterwards descended to her, the husband again covenants in the same manner as before, and "that he will" "join in surrendering such estates"

"to

"to such uses as she shall appoint"; the wife may *surrender those copyhold lands without her husband joining, and without any special custom of the manor to authorize such surrender.* *Compton v. Collinson, Hil. 30 Geo. 3.* i. 334

4. *A.* being possessed of a term of 999 years, previous to his marriage with *B.* granted the term to "*B. and her heirs immediately after the death of A.* to hold the same to the said *B.* and her heirs, and to her and their own proper use for ever." The marriage took effect, *A.* survived *B.* and died without issue, intestate, and without having taken out administration to *B.* his wife. The term upon the death of *A.* went to his administrator, not to the administrator of *B.* *Doe, on dem. of Roberts, v. Polgrean, Hil. 31 Geo. 3.* i. 535

BASTARDY.

1. Where a bastard child is born in a parish, for whose sustenance the parents do not provide necessaries, the parish officers are obliged to do so, without an order of justices for that purpose. *Hays and Another v. Bryant, Trin. 29 Geo. 3.* i. 253

BILL OF EXCHANGE.

See ASSUMPSIT, No. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12. INTEREST, No. 1. PROMISSORY NOTE.

1. Where there is judgment by default in an action on a bill of exchange, the court will refer it to the prothonotary to ascertain the damages and calculate interest, *without a writ of inquiry.* *Andrews v. Blake, Mic. 31 Geo. 3.* i. 529
2. S. P. In case of a promissory note. *Rashleigh v. Salmon, Trin. 29 Geo. 3.* i. 252
3. S. P. *Longman v. Fenn, Hil. 31 Geo. 3.* i. 541
4. An alteration of the date of a bill of exchange, by which the day of payment would be brought forward, vitiates the bill, and no action can be maintained upon it after such alter-

ation, though in the hands of an innocent indorsee, for a valuable consideration. *Master v. Miller, in the Exchequer Chamber, in error, Trin. 33 Geo. 3.* ii. 141

5. Several bills of exchange were drawn by *A.* in *England* on persons in the *East Indies*, payable sixty days after sight, and bonds given to *C.* (the indorsee) conditioned to be void, if the bills should be *duly paid in India*, or come back to *England* duly protested for non-payment, and the amount of them be paid by the obligor within a certain time after they should be so returned *protested for non-payment.* The bills were sent to *India*, but before they arrived the drawees had left the country, and their agents there refused to accept them when they did arrive. They were then protested in *India* for non-acceptance, sent back to *England* so protested: some of these being presented to one of the drawees, who was then in *England*, for payment, were *protested for non-payment* here. In debt on the bonds, the court of C. P. held, that with respect to the bills returned protested for non-acceptance, and not presented and protested for non-payment here, the obligor was not liable: but for those which were so protested for non-payment here he was liable; this being a substantial performance by the obligee of his undertaking according to the condition of the bonds: and the court gave judgment on the several counts accordingly; on two for the plaintiffs and on one for the defendant. *French v. Campbell, Trin. 33 Geo. 3.* ii. 163

[On the judgment on the two counts for the plaintiffs, the defendants brought a writ of error in K. B. which court reversed the judgment in the court of C. P. on those counts. *Hil. 35 Geo. 3. 6 Term Rep. B. R. 200.*]

6. *A.* draws a bill of exchange on *B.* payable to a fictitious payee or order, and indorsed in the name of such payee, which *B.* accepts. In an action by an innocent indorsee for a valuable

- valuable consideration against *B.* on the bill, in order to draw an inference, either that *B.* at the time of his acceptance knew the name of the payee to be fictitious, or that *B.* had given an authority to *A.* to draw the bill in question, by having given a general authority to *A.* to draw bills on *B.* payable to fictitious persons, evidence is admissible of irregular and suspicious transactions and circumstances relating to other bills drawn by *A.* on *B.* payable to fictitious payees, and accepted by *B.*, though none of those transactions or circumstances have any apparent relation to the bill in question, and though none of them prove that *B.* accepted any of those other bills, with a knowledge that the payees mentioned in them were fictitious. *Gibson v. Hunter, in the House of Lords, in error, East. 34 Geo. 3.* ii. 288
7. *A.* a merchant in *London* draws a bill of exchange on *B.* at *Pisa*, payable to the order of *C.* a *French merchant resident in France*: *C.* indorses it to *D.* of *Nice*, and *D.* to *E.* at *Leghorn*. The bill not being paid when due, *E.* draws another bill for the amount of the former on *A.* in favour of *F.* of *Leghorn*, which is indorsed to *G.* a merchant in *London*, in the course of trade, and accepted by *A.* The stat. 34 Geo. 3. c. 9. s. 4. prevents *G.* from maintaining any action on the latter bill against *A.*; and if such action be brought, the court will stay the proceedings. *Bendelack v. Morier, Trin. 34 Geo. 3.* ii. 338
8. *A.* in *England* draws a bill of exchange on *B.* in a foreign country, which, after having been negotiated through another foreign country, is presented to *B.* who refuses to pay it, on account of the law of the country in which he resides having prohibited such payment. The drawer is liable for the whole amount of the re-exchange between the different countries. *Mellish v. Simeon, Mic. 35 Geo. 3.* ii. 378
9. The purchaser of a foreign bill of exchange, payable at a certain time after sight, which is publicly offered for negotiation, is *not* bound to send it by the *earliest* opportunity to the place of its destination. *Muilman v. D'Eguino, Mic. 36 Geo. 3.* ii. 565
10. There is no fixed time when a bill drawn payable at sight, or a certain time after, shall be presented to the drawee. ii. *ib.*
11. But it must be presented within a *reasonable time*. ii. *ib.*
12. What is a reasonable time, is a question for the jury to decide, from the circumstances of the case. ii. *ib.*
13. But *semble* that if the holder of a bill so payable, neither presents it nor puts it in circulation, he is guilty of *laches*, and cannot recover upon it. ii. 565
14. It is sufficient, if notice of a bill drawn in *England* on a person in the *East Indies*, being dishonoured, is sent to *England* by the first *direct* and *regular* mode of conveyance, whether it be an *English* or a foreign ship: the holder is not bound to send such notice by the accidental, though earlier conveyance of a foreign ship not destined to this country. ii. *ib.*
15. *A.* draws a bill of exchange on *B.*, payable to the order of *A.*, which *B.* accepts, and *B.* draws a bill on *A.*, payable to the order of *B.*, which *A.* accepts, for their mutual accommodation. Both bills are payable at the same time, have the same dates, and contain the same sums. One is a good consideration for the other, and neither is an indemnity; so that if either party becomes a bankrupt, the bill accepted by him may be proved under his commission, and consequently, to an action brought on it, his bankruptcy may be pleaded. *Rolfe v. Caslon, Mic. 36 Geo. 3.* ii. 570
16. *Semble* that a letter of attorney given by an executor to *A.* enabling him to transact the affairs of the testator in the name of the executor as executor, and to pay, discharge and satisfy all debts due from the testator, conveys

conveys a sufficient authority to *A.* to accept a bill of exchange in the name of the executor, drawn by a creditor for the amount of a debt due from the testator, so as to make the executor *personally* liable. *Howard v. Baillie*, Hil. 36 Geo. 3. ii. 618

17. But clearly if the executor admits that such a bill, which has been so accepted by *A.* with the knowledge of the executor, is for a just debt, and that it ought to be paid, it affords sufficient evidence of an authority given by him to *A.* to accept that particular bill, without resorting to the letter of attorney. ii. *ib.*

BILL OF LADING.

1. The court of Exchequer-Chamber held, that where the consignee of goods became insolvent, the consignor might stop them *in transitu* before the consignee gained possession, though the consignee had assigned the bills of lading to a third person for a valuable consideration. *Mason and Others v. Lickbarrow and Others*, Hil. 30 Geo. 3. i. 357

But this judgment was reversed in the House of Lords; and a *venire de novo* awarded. ii. 211

[See 5 Term Rep. B. R. 367. 688.]

2. A bill of lading is the written evidence of a contract for the carriage and delivery of goods sent by sea, for a certain freight. i. *ib.*
3. The indorsement of a bill of lading is an assignment of the goods themselves, and differs essentially from the indorsement of a bill of exchange. i. *ib.*
4. A bill of lading, though assignable, is *not negotiable* by the custom of merchants. i. *ib.*
5. S. P. As to stopping goods *in transitu*, *Fearon v. Bowers*, coram Lee, Ch. J. 364. n.
6. S. P. *Assignees of Burghall v. Howard*, coram Lord Mansfield. i. n. 365
7. *A.* at a foreign port, ships goods by the order, and on account of *B.*, to be paid for at a future day; and bills of lading are accordingly signed by the master of the ship. One of the

bills is immediately transmitted to *B.* who, before the arrival of the ship at the place of destination, sells the goods, and indorses the bill of lading to *C.* After the arrival of the ship, and a delivery of part of the goods to the agent of *C.*, *B.* becomes bankrupt without having paid *A.* the price of the goods. By this delivery, the *transitus* is at an end as to the whole of the goods. *Slubey v. Heyward*, East. 35 Geo. 3. ii. 504

BILL OF SALE.

See AGREEMENT, No. 5.

BY-LAW.

1. A power granted by a charter to a company exercising a particular trade in a certain place, to make by-laws for the government of *all persons* exercising that trade in that place, enables it to make by-laws binding as well on persons so exercising the trade who are *not members of the company*, as those who are. *The Butchers' Company v. Morey*, East. 30 Geo. 3. i. 370

C.

CARRIER.

See AGREEMENT, No. 13.

CERTIFICATE.

See COSTS, No. 14.

- A judge's certificate that a custom-house officer "had probable cause" for seizing goods, does not extend to injuries accompanying such seizure, so as to prevent the plaintiff from recovering damages and costs under stat. 23 Geo. 3. c. 70. s. 29. and 26 Geo. 3. c. 40. s. 31. *Baldwin v. Tankard*, Trin. 28 Geo. 3. i. 28

CERTIORARI.

1. Where judgment is signed in an inferior court of record against the defendant, and he surrenders in discharge of his bail, but before he is charged

charged in execution, is removed to the Fleet by *habeas corpus*, the court will grant a *certiorari* to remove the record, in order to charge him in execution in the Fleet by virtue of *stat. 19 Geo. 3. c. 70. s. 4. Jordan v. Cole, Mic. 31 Geo. 3.* i. 532

CHARTER.

See BY-LAW.

CHURCHWARDENS.

See BASTARDY.

1. Churchwardens *de facto* may maintain an action against a former churchwarden for money received by him for the use of the parish, though the validity of the election of the plaintiffs to their office be doubtful, and though they be not the immediate successors of the defendant. *Turner v. Baynes, Mic. 36 Geo. 3.* ii. 559

CLERK OF ASSIZE.

1. By the *stat. 19 Geo. 3. c. 74.* the clerk of assize on each circuit is intitled to receive a certain fee for every person convicted of a transportable offence, [except petty larceny,] and sentenced to transportation, hard labour, or confinement in the house of correction; and for persons capitally convicted, who afterwards have received the King's pardon on condition of being transported or imprisoned. *Fleetwood v. Finch, Mic. 34 Geo. 3.* ii. 220
2. On the *Norfolk* circuit, that fee is one guinea. ii. *ib.*

COMMON.

See AGREEMENT, No. 16.

CONSIDERATION.

See AGREEMENT. ASSUMPSIT.

CONSIGNOR.

See BILL OF LADING.

CONTRACT.

See AGREEMENT. ASSUMPSIT.

COPYHOLD.

See BARON AND FEME, No. 3.

1. *A.* devises copyhold lands to trustees *in fee* (who are to be renewed from time to time) in trust that the rents and profits shall for ever afterwards be disposed of to certain *charitable purposes*; and directs that the rent of the said copyhold lands "should never be improved or raised, but continue at 11l. per annum; and that *B.* who was tenant of the said copyhold lands and his children and posterity which should succeed, should never be put forth or from the same, but always continue the possession, paying the rent of 11l." Neither *B.* nor his descendants were ever admitted on the court rolls. If *B.* took any estate, it was an equitable estate tail. *Roe, on the dem. of Eberall and Others, v. Lowe and Others, Trin. 30 Geo. 3.* i. 447
2. But the interest of *B.* (whatever it was) will not prevent the trustees from recovering in ejectment, though the rent has been regularly paid. i. *ib.*
3. An equitable estate tail of a copyhold cannot be barred by the devise alone of the tenant in tail. i. *ib.*
4. *Quære*, Whether such estate tail would be barred by a lease made by the tenant in tail for a long term, *ex. gr.* for 2000 years? i. *ib.*
5. But clearly where such lease is attended with doubtful or suspicious circumstances, it shall not prevent the trustees from recovering in ejectment against the lessee. i. *ib.*
6. Nor is it an objection to the title of the trustees, that from the time of the original devise of *A.* to a certain period, the former trustees do not appear to have been admitted on the rolls of the manor, if there have been regular surrenders and admittances for a considerable time (*ex. gr.* for above 40 years) since that period. i. *ib.*
7. For it will be presumed that surrenders and admittances were regularly made before that period, especially as the rent has been regularly paid. i. *ib.*

CONSTABLE.

CONSTABLE.

1. A constable cannot act as such out of his particular district. *Blatcher v. Kemp, coram Lord Mansfield at Maidstone Summer Assizes, 1782.*
i. n. 15
2. Even though a warrant be directed to "A. constable of B., to C., and to all other officers of the peace in the county of D."
i. ib.
3. *S. P. Wallace v. King, East. 28 Geo. 3.*
i. 13. Qu?

COSTS.

See BANKRUPT, No. 2, 3. 13. EXCHEQUER CHAMBER, No. 1. SLANDER, No. 1.

1. A prisoner suing the gaoler as a party grieved on the *Habeas Corpus* act, for refusing him a copy of warrant of commitment, and having recovered the penalty, is entitled to costs. *Ward v. Snell, East. 28 Geo. 3.*
i. 10
2. Where there are many defendants, some of whom go to trial and obtain a verdict, but others suffer judgment by default; the damages and costs on the judgment by default may be deducted from the costs taxed to those defendants who obtained a verdict. *Schoole v. Noble and Others, Trin. 28 Geo. 3.*
i. 23
3. An attorney has a lien for his bill of costs, on money levied by the sheriff under an execution on a judgment recovered by his client, and is entitled to have it paid over to him, notwithstanding the sheriff has had notice from the party, against whom the judgment was recovered, to retain the money in his hands, and that the court would be moved to set aside the judgment, and notwithstanding a docket has been struck against the client becoming a bankrupt. *Griffin v. Eyles, Hil. 29 Geo. 3.*
i. 122
4. The court will not require a plaintiff to give security for costs, merely on account of his residence abroad. *Parquot v. Eling, Hil. 29 Geo. 3.*
i. 106
5. There must be special circumstances

- to induce the court to require such security.
i. 106
- [See post. No. 24. 29. and tit. PRACTICE, No. 43. 50. 53.]
6. But the circumstances of the plaintiff being a foreigner and insolvent, are not sufficient if he reside in England. *Porrier v. Carter, Hil. 29 Geo. 3.*
i. ib.
7. In an action of debt for the penalty of the stat. 2 & 3 Ed. 6. c. 13. for not setting out tithes, with a count in the declaration for the single value, after a demurrer to the declaration the parties submit to arbitration, and the arbitrator awards the single value to be less than twenty nobles; the plaintiff is not entitled to costs on the counts for the penalty under the stat. 8 & 9 W. 3. c. 11. s. 5. the value not having been found by a jury; but he is entitled to costs on the count for the single value. *Barnard v. Moss, Hil. 29 Geo. 3.*
i. 107
8. An attorney has only such a lien on the costs, as is subject to the equitable claims of the parties in the cause.
i. ib.
- S. P. Nunez v. Modigliani, East. 29 Geo. 3.*
i. 217
9. Several actions brought on two policies of insurance, underwritten by the same parties, (among whom are A. and B.) are respectively consolidated; in one of the causes which goes to trial A. is defendant, in the other B. The plaintiff becomes entitled to costs in one action, and the defendant in the other. The costs taxed to the defendant may be set off against those taxed to the plaintiff. *Nunez v. Modigliani, East. 29 Geo. 3.*
i. 217
10. A. brings an action against B., the expenses of defending which are borne by C. and D., but A. is nonsuited. Afterwards C. brings an action against A. in which D. is interested as well as A., and C. is nonsuited. The costs of one nonsuit may be set off against those of another. *O'Connor v. Murphy, Trin. 31 Geo. 3.*
i. 657
11. An award of "Costs sustained in the

- "*the action*", does not include the costs of the reference to the arbitrator. *Browne v. Marsden, East.* 29 Geo. 3. i. 223
12. Where in an action against officers of the excise for seizing goods, they do not tender amends before action brought, but pay money into court and afterwards gain a verdict, they are intitled only to single costs under *stat.* 23 Geo. 3. c. 70. s. 31. *Collins and Another v. Morgan and Another, Trin.* 29 Geo. 3. i. 244
13. *Quære.* Whether they are entitled to treble costs under the 34th section of that statute, if they tender amends? i. *ib.*
14. Where in trespass for an assault and battery, the count stating the battery goes on, "and the said defendant *then and there* tore, &c. the clothes, &c. of the plaintiff (specifying *them*), wherewith he was *then and there* clothed, and which he *then and there* had on, &c.", and the damages are under 40s. and the judge does not certify, the plaintiff is intitled to *no more costs than damages.* *Mears v. Greenaway, Mic.* 30 Geo. 3. i. 291
15. Although the defendant have judgment on demurrer in *quare impedit*, he is not intitled to costs. *Thrale and Others v. The Bishop of London and Others, Mic.* 31 Geo. 3. i. 530
16. Executors and administrators are liable to costs in error, in cases where they would be liable in the original action. *Williams and Another v. Riley, in the Exchequer Chamber, in error, Hil.* 31 Geo. 3. i. 566
17. Where a cause having been once tried, a new trial is granted, but a juror withdrawn, on the party who gained the verdict at the first trial undertaking generally *to pay the other his costs*; such an undertaking includes only the costs of the second trial. *Rouse v. Bardin and Others, East.* 31 Geo. 3. i. 639
18. Where a cause is twice tried, and the verdict found on each trial for the same party, he is intitled to the costs of both trials; but where the verdicts are for different parties, the costs for the former trial are not allowed. *Parker v. Wells, East.* 25 Geo. 3. i. n. 639
19. *S.P. Trelawney v. Thomas, East.* 31 Geo. 3. i. 641
20. The court will not stay proceedings against the defendant, till the debt and costs recovered by him in a former action against the plaintiff be staid. *Cooke v. Dobree, East.* 28 Geo. 3. i. 10
21. Where to an action of trespass for breaking and entering the plaintiff's close, &c. the defendant pleads a special plea of justification to the whole declaration, and the verdict is against him, the plaintiff is entitled to full costs, although the damages are less than 40s. and the judge at the trial does not certify. *Redridge v. Palmer, Mic.* 32 Geo. 3. ii. 2
- S.P. Comer v. Baker, Trin.* 34 Geo. 3. 342
22. The court will not compel the plaintiff in a *qui tam* action to give security for costs, though it appear by affidavit that he is insolvent. *Field qui tam v. Carron, East.* 32 Geo. 3. ii. 27
23. If there be two defendants in an action of *assumpsit*, one of whom suffers judgment by default, and the other obtains a verdict, he who obtains the verdict is entitled to costs. *Shrubb v. Barrett, East.* 32 Geo. 3. ii. 28
24. A plaintiff who is resident abroad, is compellable to give security for costs, though no other circumstance than his residence be stated in the affidavit. *Ganesford v. Levy, Mic.* 33 Geo. 3. ii. 118
25. No action will lie in this court to recover costs ordered to be paid by a rule of an inferior court, in the course of a suit there, notwithstanding the defendant should not be liable to an attachment of the inferior court, by being resident out of its jurisdiction. But such an action having been brought, the court ordered the costs awarded to the plaintiff in the inferior court to be deducted from those allowed to the defendant in the action.

- action. *Emerson v. Lashley, Mic. 34 Geo. 3.* ii. 247
26. Executors are not liable to costs on a judgment as in the case of a nonsuit, under the *stat. 14 Geo. 2. c. 17. Booth v. Holt, Hil. 34 Geo. 3.* ii. 277
27. Where the plaintiff withdraws the record after the cause is called on for trial, the court will make it a condition of discharging a rule for judgment as in case of a nonsuit, that he shall pay the defendant the costs of the day, occasioned by not countermanding notice of trial, though the practice of the court is not to grant a rule for costs for not going on to trial, and a rule for judgment as in case of a nonsuit at the same time. *Jordaine v. Sharpe, Hil. 34 Geo. 3.* ii. 280
28. An attorney is not liable to pay the costs of taxing his bill under the *stat. 2 Geo. 2. c. 23. s. 23.* where the deduction of one-sixth is occasioned not by the particular items being taxed, but by a whole branch of it being disallowed. *White v. Milner, Mic. 34 Geo. 3.* ii. 357
29. A foreign seaman having brought an action for his wages against a foreigner, the court refused to compel him to give security for costs, on account of his being on a voyage on board an *English* ship. *Henschen v. Garves, Mic. 35 Geo. 3.* ii. 383
30. Where the plaintiff in replevin pleads several pleas in bar of an avowry, on which issues are joined, and one of them is found for him which establishes his right of action, and the others for the defendant, and the judge does not certify under the *stat. 4 Anne, c. 16.* the defendant is entitled to the costs, not only of the pleadings which compose, but also of the trial of those issues which are found in his favour. *Brooke v. Willett, Hil. 35 Geo. 3.* ii. 435
31. *A.* having obtained a verdict against *B.* for a small sum, and *B.* having previously recovered judgment against *A.* for a larger sum, and taken him in execution, the court will permit the sum obtained by *A.*, by the ver-

dict and the costs, to be deducted from the amount of the judgment of *B.*, and satisfaction to be entered for so much, notwithstanding *A.* is insolvent, and has no means of paying his attorney's bill, but by the sum for which he obtained the verdict. *Vaughan v. Davis, Hil. 35 Geo. 3.* ii. 440

32. *S. P. Dennie v. Elliott, Mic. 36 Geo. 3.* ii. 587

33. After the defendant has agreed to take short notice of trial, the court will not compel the plaintiff, though a foreigner and resident abroad, to give security for costs. *Michel v. Pareski, Hil. 36 Geo. 3.* ii. 593

COVENANT.

See PLEADING, No. 2. 6, 7. 9, 10, 11. 17. 20.

1. A covenant on a lease, that the lessee, his executors and administrators, shall constantly reside upon the demised premises, during the demise, is binding on the assignee of the lessee, though he be not named. *Tattem v. Chaplin, East. 35 Geo. 3.* ii. 133
2. *A.* covenants to build a house for *B.* and finish it on or before a certain day, in consideration of a sum of money which *B.* covenants to pay *A.* by instalments as the building shall proceed. The finishing the house is not a condition precedent to the payment of the money, but the covenants are independent. *A.* therefore may maintain an action of debt against *B.* for the whole sum, though the building be not finished at the time appointed. *Terry v. Duntze, Hil. 35 Geo. 3.* ii. 389

COVERTURE.

See BARON AND FEME.

COUNTY COURT.

1. An action cannot be maintained in a county court, unless both the defendant reside, and the cause of action

- tion arise within the county. *Welsh v. Troyte, East. 32 Geo. 3.* ii. 29
2. Therefore though the demand be for less than 40s. if the cause of action arise in one county, and the defendant live in another, the action must be brought in a superior court. ii. *ib.*

CURACY *Perpetual.*

See QUARE IMPEDIT.

CUSTOM.

1. A custom that a tenant may leave his away-going crop in the barns, &c. of the farm for a certain time after the expiration of the lease, is good. *Beavan v. Delahay and Another, East. 28 Geo. 3.* i. 5
2. A custom for "all the inhabitants of a parish to play at all kinds of lawful games, sports and pastimes, in the close of A. at all seasonable times of the year at their free will and pleasure", is good; but a similar custom, "for all persons for the time being, being in the said parish", is bad. *Fitch v. Rawling, Hil. 35 Geo. 3.* ii. 398

CUSTOMS, OFFICERS OF.

1. An action cannot be maintained against an officer of the customs, for seizing goods as forfeited by the revenue laws, unless it be brought within three months after the actual seizure, notwithstanding a suit is instituted in the Exchequer for the condemnation of the goods, which is depending at the expiration of the three months. *Godin v. Ferris, Mic. 32 Geo. 3.* ii. 14

D.

DEBT.

See BANKRUPT, No. 6, 7, 8, 9, 10.
PLEADING, No. 3, 4, 5.

DEED.

1. A deed of release containing the words "all lands, &c. belonging,

"used, occupied and enjoyed, or deemed so taken, or accepted as part thereof", &c. will pass leasehold lands, which answer that description, as well as freehold; especially against the releasor. *Doe, on dem. of Davis and Another, v. Williams, Trin. 28 Geo. 3.* i. 25

2. A deed poll containing an insurance against fire, may refer to conditions in a printed paper without stamp, seal or signature. *Routledge v. Burrell, Trin. 29 Geo. 3.* i. 254

DELIVERY OF GOODS.

See BILL OF LADING.

- A. agrees to sell goods to B., who pays a certain sum of money as earnest: the goods are packed in cloths furnished by B., and deposited in a building belonging to A. till B. shall send for them, but A. declares at the same time that they shall not be carried away till he is paid. This not being a delivery to B., A. cannot maintain an action for goods sold and delivered. *Goodhall v. Skelton, Trin. 34 Geo. 3.* ii. 316

DEMURRER.

Semb. that judgment on a general demurrer to a plea in bar, the matter of which, even if well pleaded, would be no defence to the action, is to be considered as a judgment by default. *Barney v. Tubb, Mic. 35 Geo. 3.* ii. 352

DEMURRER TO EVIDENCE.

On a demurrer to circumstantial evidence, the party offering the evidence is not obliged to join in demurrer, unless the party demurring will distinctly admit upon the record every fact and every conclusion which the evidence offered conduces to prove. *Gibson v. Hunter, in the House of Lords, Trin. 33 Geo. 3.* ii. 187

DEVISE.

See COPYHOLD.

1. A possibility coupled with an interest,

- est, is deviseable. *Roe, on the dem. of Perry, v. Jones, Trin. 28 Geo. 3.* i. 30.
- N. B. The judgment in this case was affirmed by the court of King's Bench on a writ of error. *Hil. 28 Geo. 3. See 3 Term Rep. B. R. 88.*
2. Where there is a devise to *A.* of *all* and *every* of the testator's several "lands, messuages, tenements, and "hereditaments whatsoever and "wheresoever, whereof he was seised and interested in or entitled to", with a specific bequest of his *personal estate* to *B.*, *A.* does not take leasehold lands, but they go to *B.* as part of the personal estate. *Pistol, on dem. of Randal, v. Riccardson, Hil. 24 Geo. 3. B. R.* i. n. 26
 3. A devise of "all the rest and residue "of my estate of what nature or kind "soever" includes real as well as personal property, though accompanied with limitations peculiarly applicable, and usually applied to personal property alone. *Doe, on dem. of Burkitt and Others, v. Chapman, East. 29 Geo. 3.* i. 223
 4. *Quære*, Whether in a devise, the words "estate of what kind soever", immediately preceded and followed by particular descriptions of personal property, will pass a remainder in fee of lands vested in the testator? *Dally v. King, East. 28 Geo 3.* i. 3
 - 5 *A.* devises an advowson to the *first* or *other son* of *B.* *that should be bred a clergyman and be in holy orders*, in fee, but in case *B.* should have no such son, then to *C.* in fee. Both devises are void, as depending on too remote a contingency; therefore, though *B.* dies without having had a son, the heir at law of the devisor, and not *C.*, is entitled. *Proctor v. The Bishop of Bath and Wells, Mic. 35 Geo. 3.* ii. 358
 6. Lands, &c. are devised to *B.* for life, and after his decease to *all and every such child or children* of *B.* *as shall be living at the time of his decease.* A posthumous child of *B.* shall share equally with those who were born in his life-time. *Doe v. Clarke, Hil. 35 Geo. 3.* ii. 399
 7. *A.* by his will reciting, "as to such "worldly estate as God has pleased "to bless me with" made a provision for his heir at law, and "devised all "the rest and residue of his goods, "chattels, rights, credits, personal "and *testamentary estate* whatsoever "to *B.* for his own use, benefit and "disposal." Under this clause, *B.* took an *estate in fee* in the lands of the testator. *Smith v. Coffin, East. 35 Geo. 3.* ii. 444
 8. A bond conditioned for the payment of a sum of money to such person as *A. B.* shall by will appoint, is not forfeited by non-payment to the residuary legatee of *A. B.*, no specific appointment having been made. A power of appointment by will is not executed by a mere devise of the residue. *Buckland v. Barton, East. 33 Geo. 3.* ii. 136

DISCONTINUANCE OF ACTION.

See PLEADING, No. 19.

DISCONTINUANCE OF ESTATE.

In order to discontinue an estate-tail, it is necessary that the party discontinuing should be actually seised by force of the entail. *Driver, on dem. of Burton, v. Hussey and Others, Trin. 29 Geo. 3.* i. 269

DISTRESS.

1. Where there is a custom that a tenant may leave his away-going crops in the barns, &c. of the farm, for a certain time after the lease has expired, and he has quitted the premises, the landlord may distrain the corn so left for rent arrear, *after six months* have expired from the determination of the term. *Beavan v. Delahay and Another, East. 28 Geo. 3.* i. 5
2. *S. P. Lewis v. Harris, cor. Skynner, Ch. Baron, Summer Assizes at Hereford, 18 Geo. 3.* i. n. 7
3. A distress taken for rent accrued after the expiration of a notice to quit,

is a waiver of the notice. *Zouch, on the dem. of Ward, v. Willingale, Hil. 30 Geo. 3.* i. 311

4. Where the lessee of lands dies before the expiration of the term, and his administrator continues in possession during the remainder, and after the expiration of it, a distress may be taken for rent due for the whole term. *Braithwaite v. Cooksey and Another, Trin. 30 Geo. 3.* i. 465

DOWER.

1. A marriage celebrated in *Scotland* (but not between persons who go thither to evade the laws of *England*) will entitle the woman to dower in *England*. *Ilderton v. Ilderton, Trin. 33 Geo. 3.* ii. 145
2. The lawfulness of such a marriage may be tried by a jury: therefore a replication to a plea of "*ne unques accouple*" in a writ of dower, alleging a marriage in *Scotland*, may conclude to the country; and in such a replication it is not necessary to state that the marriage was had in any place in *England* by way of venue. ii. *ib.*

E.

EAST INDIES.

See AFFIDAVIT, No. 5. INTEREST, No. 1.

Quære, Whether the *stat. 7 Geo. 1. st. 1. c. 21.* does not extend to all trading by *British* subjects in the *East Indies*? *Sumner v. Green, Mic. 30 Geo. 3.* i. 301

EJECTMENT.

See COPYHOLD, No. 2. 5. PRACTICE, No. 35.

ERROR, WRIT OF.

See AGREEMENT, No. 3. EXCHEQUER CHAMBER, COURT OF, No. 1, 2. PEER, No. 2. PLEADING, No. 33. PRACTICE, No. 31. 34. 39.

1. Though it appears on the return to a *certiorari*, that no bill was filed in the court of King's Bench against the defendant, (in an action there by bill,) in the term of which the declaration is entitled, but that a bill was filed against him by the plaintiff in the following vacation, it is not *erroneous*, if it also appears that the bill was filed of the preceding term. *Parrot v. Spraggon, Hil. 36 Geo. 3.* ii. 608

ESCAPE.

An action of debt will lie against a gaoler for the escape of a prisoner in execution, though the escape were without the knowledge or fault of the gaoler, who in such case can avail himself of nothing but the act of God or the king's enemies, as an excuse. *Alsept v. Eyles, Trin. 32 Geo. 3.* ii. 108

ESTATE TAIL.

See COPYHOLD, No. 1. 3, 4. DISCONTINUANCE OF ESTATE, No. 1.

1. By a marriage settlement lands were limited to *A.* for life, remainder to *B.* for life, with intermediate remainders, remainder to the heirs of the body of *B.* *A.* became a bankrupt, and by an act of parliament passed to vest his estates in trustees for the payment of his debts, &c. the lands were given after payment, &c. to *B.* for life, with *such remainders over* (in general terms of reference) *as were limited by the settlement.* Under these circumstances *B.* had a vested estate tail, of which a recovery might be suffered. *Goodright v. Rigby, Trin. 32 Geo. 3.* ii. 46
2. A limitation in a deed, to the use of *A.* for life, with remainder to *the first son of the body of A.* lawfully issuing, and *for default of such issue*, to the second, third, and other sons of *A.* and of the several heirs male of the body and bodies of all and every such son and sons respectively issuing, gives an estate in *tail male* to the first son

of

of *A. Owen v. Smyth, Hil. 36 Geo. 3.*
ii. 594

EVIDENCE.

See AGREEMENT, No. 9. ANNUITY, No. 5. ASSUMPSIT, No. 12. BANKRUPT, No. 19. BILLS OF EXCHANGE, No. 6. PLEADING, No. 12. VARIANCE.

1. The verbal declarations of an-auctioneer at the time of the sale, are not admissible evidence to contradict the printed conditions. *Gunnis and Others v. Erhart, Mic. 30 Geo. 3.*
i. 289
2. *A.* having given a bond to *B.* for the payment of money, which, it is understood between them, is to be applied towards indemnifying *B.* from the expences of an election in which *B.* is a candidate; in an action brought by *C.* against *D.* for money advanced and services performed in supporting the interest of *B.* at the request of *D.*, *A.* is not a competent witness. *Trelawney v. Thomas, Mic. 30 Geo. 3.*
i. 303
3. An inquisition made by the sheriff's jury to ascertain the property of goods taken under a *fi. fa.* though found in favour of *A.* is not admissible evidence in an action of trover for the goods brought by *A.* against the sheriff. *Latkow v. Eamer, Hil. 35 Geo. 3.*
ii. 437
4. In an action against *A.* for enticing the servant of *B.* from his service, it is sufficient evidence of the enticement that *A.* asked the servant to enlist in the army, and afterwards gave him money. *Keane v. Boycott, East. 35 Geo. 3.*
ii. 511
5. *A.* devised lands to *B.* and afterwards upon his marriage conveyed them by lease and release to trustees to other uses, with the usual limitations in marriage settlements. *Parol evidence* was not admissible to shew that *A.* meant his will to remain in force, unrevoked by the subsequent conveyance. *Goodtitle v. Otway, East. 35 Geo. 3.*
ii. 516
6. A person who is employed to sell

goods, and is to have for himself whatever money he can procure for them, beyond a stated sum, is a competent witness to prove the contract between the buyer and the seller. *Benjamin v. Porteus, Hil. 36 Geo. 3.*
ii. 590

EXCHEQUER CHAMBER,

Court of.

1. The court of Exchequer Chamber is bound to allow double costs to the defendant in error, on the affirmance of a judgment of the King's Bench. *Shepherd v. Mackreth in error, Hil. 34 Geo. 3.*
ii. 284
2. But it is entirely a matter in the discretion of that court, whether *interest* shall be allowed or not, on such affirmance.
ii. *ib.*

EXCISE, OFFICERS OF.

See COSTS, No. 12, 13.

EXECUTION.

See PRACTICE, No. 52.

EXECUTOR.

Executors are not liable to costs on a judgment as in case of a nonsuit, under the *stat. 14 Geo. 2. c. 17.* *Booth v. Holt, Hil. 34 Geo. 3.*
ii. 277

EXECUTOR DE SON TORT.

See PLEADING, No. 2.

F.

FEEES.

The warden of the Fleet has no right to demand an additional fee for expedition in returning a writ of *habeas corpus.* *Johnson v. Smith, Hil. 29 Geo. 3.*
i. 105

FEME COVERT.

See BARON and FEME, COPYHOLD.

FINE.

See ANNUITY, No. 4.

1. Rules

1. Rules of court respecting the passing of fines. i. 526, 527

2. *A.* seised in fee of lands, dies leaving *B.* his heir a feme covert. Upon his death a stranger makes a tortious entry on the lands, continues in possession, and levies a fine sur cognizance de droit come ceo, with proclamations, *B.* afterwards dies under coverture, no entry having been made on her behalf to avoid the fine, leaving *C.* her heir of the age of twenty-one, of sound mind, out of prison, and within the realm. The fine is a bar to the right of *C.* unless he make his claim within five years after the death of *B.* *Dillon v. Leman, Mic. 36 Geo. 3.* ii. 584

FOREIGN LAWS.

See AMERICA.

FRAUDS, STATUTE OF.

A. and *B.* enter into a verbal agreement for the sale of goods, to be delivered to *A.* at a future period: there is neither earnest paid, a note or memorandum in writing signed, nor any part of the goods delivered: this contract is void, being within the statute of frauds, though it is executory, and though it has been admitted by *B.* in his answer to a bill in Chancery filed by *A.* *Rondeau v. Wyatt, Trin. 32 Geo. 3.* ii. 63

G.

GAMING.

See HORSE RACE.

GLEANING.

1. No persons have a right to glean in the harvest field by the common law. *Steel v. Houghton and Us. Trin. 28 Geo. 3.* i. 51
2. Nor have the poor of a parish, legally settled, such a right. i. *ib.*
3. *S. P. Worlledge v. Manning, East. 26 Geo. 3.* i. n. 53

GRANT.

See QUARE IMPEDIT.

GUARANTEE.

A. having sent an order to *B.* for certain goods, *C.* undertakes to guarantee payment to *B.* upon an undertaking of *D.* to indemnify *C.*; *B.* accordingly informs *C.* that the goods are preparing, and afterwards ships them for *A.* without giving notice to *C.* that they are shipped. Afterwards *D.* desires to recal his indemnity, upon which *C.* writes to *B.* to know whether he had executed the order, to which no answer is given by *B.* for a considerable time, he having gone abroad in the interim. Upon this *C.* supposing from the silence of *B.* that the order was not executed, gives up his indemnity to *D.* *C.* still remains liable to *B.* on his guarantee. *Osley v. Young, Hil. 36 Geo. 3.* ii. 613

H.

HIGHWAYS.

See PLEADING, No. 12.

HORSE.

See WARRANTY.

HORSE RACE.

Where by the terms of a horse race the entrance money is to be given to the second best horse, and it is doubtful on the wording of those terms, whether all the money paid at the entering each horse, is to be considered as entrance money, the court will put such a construction on the terms as will include the whole in the description of entrance money to be given to the second best horse, being most agreeable to stat. 13 Geo. 2. c. 19. s. 2. and 7. *Dowson v. Scriven, East. 29 Geo. 3.* i. 218

HORSE WARRANTY.

See WARRANTY.

INFANT.

I.

INFANT.

See SLAVE.

A warrant of attorney given by an infant, is absolutely void, which the court will not confirm, though the infant appear to have given it, knowing it was not valid, for the purpose of collusion. *Saunderson v. Marr*, Mic. 29 Geo. 3. i. 75

INFANT EN VENTRE SA MERE.

See DEVISE, No. 6.

An infant en ventre sa mere, is considered as born, for all purposes which are for his own benefit. *Doe v. Clarke*, Hil. 35 Geo. 3. ii. 399

INQUIRY, WRIT OF.

See BILL OF EXCHANGE, No. 1, 2, 3.

INSOLVENT.

See LORDS' ACT.

INSURANCE.

See PARTNERS. POLICY.

INTEREST.

1. A bond is given by *A.*, *B.* and *C.* to *D.*, reciting "that *A.* having received " from *D.* a certain sum of money in " the *East Indies*, had drawn bills of " exchange there payable to *D.* on " a house in *England*; and that the " obligors had agreed with *D.* that " if the bills should not be accept- " ed and paid, they would pay the " amount thereof, with interest from " the day of their respective dates, by " way of penalty", with a condition to be void if the bills should be accepted and paid according to the tenor thereof. On non-payment of the bills, *D.* is entitled to recover no more than the amount of them with interest from the time of their becoming due. *Orr v. Churchill*, East. 29 Geo. 3. i. 227

2. In assumpsit for work and labour and money paid, the jury will in the verdict calculate interest on the money really advanced, but not on the damages for the work and labour. *Trelawney v. Thomas*, Mic. 30 Geo. 3. i. 303

JOINDER IN ACTION.

See AGREEMENT, No. 13. ASSUMPSIT, No. 18. BARON AND FEME, No. 1.

IRELAND.

See BANKRUPT, No. 29, 30. RECOVERY, No. 3.

L.

LAND-TAX.

A house within the limits of an hospital, appropriated to an officer of the hospital for the time being, is not assessable to the land-tax. *Harrison v. Bulcock and Others*, Hil. 28 Geo. 3. i. 68

LEGACY.

1. Where there is a devise to *A.* for life, of the rents and profits of a real estate, and the interest and dividends of personal property, and after his death, the whole estates both real and personal to be divided between *B.* and *C.* the executors and trustees are bound to pay to *A.* the annual produce of the personal as well as real property, especially if the personal property be money in the funds, without requiring a receipt stamped as for a legacy. *Green v. Croft*, East. 32 Geo. 3. ii. 30
2. Where two legacies of the same sum are bequeathed to the same person by different instruments, viz. one by a will, and the other by a codicil, the legatee is entitled to both unless there be some circumstance to shew the intention of the testator, that he should take but one. *James v. Semmens*, Mic. 34 Geo. 3. ii. 213
3. A bond conditioned for the payment of

of a sum of money to such person as *A.* shall by will appoint, does not become absolute by the non-payment to the *residuary legatee* of *A.*, no specific appointment having been made by him. *Buckland v. Barton, East. 33 Geo. 3.* ii. 136

4. A power of appointing by will is not executed by a mere devise of the residue. ii. *ib.*

LEVARI FACIAS DE BONIS ECCLESIASTICIS.

See PRACTICE, No. 15.

LIEN.

See ATTORNIES, No. 1, 2.

1. A quantity of timber placed in a dock on the bank of a navigable river, being accidentally loosened, is carried by the tide to a considerable distance, and left at low water upon a towing path. *A.* finding it in that situation, voluntarily conveys it to a place of safety, beyond the reach of the tide at high water. *A.* has no *lien* on the timber for the trouble or expense to which he may have put himself in the carriage of it, but is liable to an action of trover, unless he deliver it up to the owner on demand, though nothing be tendered by the owner by way of compensation. *Nicholson v. Chapman, Mic. 34 Geo. 3.* ii. 254
2. But probably in such case *A.* might maintain an action against the owner for a compensation. ii. *ib.*

LIMITATIONS, STATUTE OF.

See BANKRUPT, No. 25. CUSTOMS, OFFICERS OF. FINE. PLEADING, No. 41.

Where a bill of exchange is drawn payable at a certain future period, for the amount of a sum of money lent by the payee to the drawer at the time of drawing the bill, the payee may recover the money in an action for money lent, although six years have elapsed since the time when the

loan was advanced; the Statute of Limitations beginning to operate only from the time when the money was to be repaid, *i. e.* when the bill becomes due. *Wittersheim v. the Countess Dowager of Carlisle, East. 31 Geo. 3.* i. 631

LONDON.

See AUCTIONEER.

1. *Quære*, How far the Freemen of the City of *London* have a right to be exempted from the payment of all tolls and port duties throughout *England* (except the prizes of wines), in whatever place they reside, and though they have obtained their freedom by purchase? *Corporation of London v. the Corporation of Lynn, East. 29 Geo. 3.* i. n. 206 & 216
2. The Court of Requests for the City of *London* has no jurisdiction in a suit, unless both the plaintiff and defendant are resident within the city. *Brooks v. Moravia, Mic. 34 Geo. 3.* ii. 220

LORDS' ACT.

1. Where a prisoner has been brought into court to be discharged under the Lords' Act, and upon his examination the court have refused to discharge him, they will not afterwards discharge him on that act, though he make an affidavit stating circumstances, in answer to the cause shewn against his discharge on his former examination, and that those circumstances were not then disclosed, by mistake. *Thornton and Another v. Dumphy, Hil. 29 Geo. 3.* i. 101
2. The 5th section of 26 *Geo. 3. c. 44.* is only meant to remedy a neglect in not taking the benefit of the Lords' Act, within the time limited by that act. i. *ib.*

LOTTERY.

See ASSUMPSIT, No. 2. BANKRUPT, No. 1.

1. In an affidavit to hold to bail on the lottery acts, it is sufficient to state that the

the defendant "*insured or caused to be insured*", &c. *Pritchett v. Cross*, Hil. 32 Geo. 3. ii. 17

2. In an action for the penalties of the lottery acts, it is sufficient if the process state the sum to which they amount as the debt, without describing it as arising from penalties, or specifying the offence, provided there be an affidavit for that purpose; and it is also sufficient compliance with the *stat. 33 Geo. 3. c. 62. s. 38.* to state in the process that the plaintiff is "appointed by the commissioners of his majesty's stamp duties to prosecute." *King v. Pacey*, Hil. 36 Geo. 3. ii. 601

M.

MANUMISSION.

See SLAVE.

MARRIAGE IN SCOTLAND.

See DOWER.

MONEY HAD AND RECEIVED,
PAID, &c.

See ASSUMPSIT.

MORTGAGOR. MORTGAGEE.

See AGREEMENT, No. 5, 6.

N.

NEW ASSIGNMENT.

See PLEADING, No. 18.

NOLLE PROSEQUI.

Where the cause of a demurrer to a declaration is, that the counts are improperly joined, the plaintiff cannot enter a *nolle prosequi* as to some, and leave the others remaining. *Rose & Ux. v. Bowler and Others*, Hil. 29 Geo. 3. i. 108

NONSUIT, *Judgment as in Case of.*

See PRACTICE, No. 9. 32.

NOTICE.

See WARRANTY.

NOTICE OF ACTION.

The lord of a manor, who is also a justice of the peace, is entitled to a month's notice of an action brought against him for taking away a gun in the house of a person unqualified to kill game, by the *stat. 24 Geo. 2. c. 44.* for it will be presumed that he acted as a justice. *Briggs v. Sir Frederick Evelyn*, Trin. 32 Geo. 3. ii. 114

NOTICE TO APPEAR.

See PRACTICE, No. 6, 7.

NOTICE OF BAIL.

See ATTACHMENT OF CONTEMPT, No. 3. PRACTICE, No. 11, 12.

NOTICE OF MOTION.

See PRACTICE, No. 32.

NOTICE TO QUIT.

See DISTRESS, No. 3.

Tenant for life makes a lease for ——— years to commence on a certain day, and dies (before the expiration of the lease) in the middle of a year. The remainder-man receives rent from the lessee (who continues in possession, but not under a fresh lease) for two years together, on the days of payment mentioned in the lease. This is evidence, from which an agreement will be presumed between the remainder-man and lessee, that the lessee should continue to hold from the day, and according to the terms of the original demise; so that *notice to quit ending on that day* is proper. *Roe, on dem. Jordan, v. Ward*, Hil. 29 Geo. 3. i. 97

NOTICE

NOTICE OF TRIAL.

See PRACTICE, No. 3. 15.

O.

OFFICE.

See AGREEMENT, No. 11, 12.

OFFICER, Military, Pay of.

See ANNUITY, No. 4.

P.

PARTNERS.

See AGREEMENT, No. 4. 13. 18.

- A.* and *B.* are engaged in a partnership in insuring ships, &c. which is carried on in the name of *A.*, and *A.* pays the whole of the losses. Such a partnership being illegal by *stat. 5 Geo. 1. c. 18.* *A.* cannot maintain an action against *B.* to recover a share of the money which has been so paid. *Mitchell v. Cockburne, Mic. 35 Geo. 3.* ii. 379

PATENT.

- A patent was granted to *A.* for a new *invented method* of using an old engine, in a more beneficial manner than was before known. The specification stated that the *method* consisted of certain *principles*, and described the mode of applying those principles to the purposes of the invention: and an act of parliament, reciting the patent to have been for the making and vending *certain engines* by him invented, extended to *A.* for a longer term than 14 years, the privilege of *making, constructing and selling, the said engines.* *Qu.* Whether under these circumstances the patent-right was valid? *Boulton v. Bull, East. 35 Geo. 3.* ii. 463

PAYMENT OF MONEY INTO COURT.

1. The plaintiff in replevin may pay the

rent into court for which the defendant avows. *Vernon v. Wynne, Trin. 28 Geo. 3.* i. 24

2. *Qu.* Whether the defendant can demur to the evidence after payment of money into court? *Jenkins v. Tucker, Mic. 29 Geo. 3.* i. 90
3. Where a carrier has given notice by printed terms, that he will not be answerable for goods above the value of a certain specified sum, unless paid in proportion, in an action brought against him for the loss of goods above that value (but for which he has not been paid an extraordinary price), he may pay into court the sum specified. *Hutton & Ux. v. Bolton, B. R. East. 22 Geo. 3.* i. n. 299
4. Payment of money into court on the whole declaration, in an action on a bill of exchange, is such an admission of the validity of the bill, as to prevent the necessity of proving the handwriting of the drawer. *Gutteridge v. Smith, Mic. 35 Geo. 3.* ii. 374
5. *Qu.* Whether, after paying money into court, there can be a nonsuit? ii. *ib.*

PEER.

1. *Qu.* Whether a peer of parliament can be sued in the King's Bench by bill? *Earl of Lonsdale v. Littledale, in the Exchequer Chamber, in error, Mic. 34 Geo. 3.* ii. 267
2. But having pleaded in chief to a bill filed against him in that court, he cannot afterwards assign for error that he ought to have been sued by *original writ*, and not by bill. *S. C. in the House of Lords, in error, East. 34 Geo. 3.* ii. 299

PLEADING.

See DOWER, No. 2. REQUESTS, COURT OF, No. 1.

1. In order to maintain a writ of right, the demandant must shew an actual seisin by taking the esplees, either in himself or the ancestor from whom he claims. *Dally v. King, East. 28 Geo. 3.* i. 1
2. In

2. In an action against executors in their own right, on a covenant for good title and quiet enjoyment against "any person or persons whatever", contained in an assignment of a lease of the testator, by way of mortgage, the declaration must shew a breach by some act of the covenantors. *Noble v. King and Another*, Trin. 28 Geo. 3. i. 34
 3. In an action of debt on a simple contract, the declaration is good, though it specify a less sum in the several counts, than is demanded in the recital of the writ, and yet assigns as a breach of non-payment of the sum demanded in the writ. *M'Quillin v. Cox*, Trin. 29 Geo. 3. i. 249
 4. In such action the plaintiff may prove and recover a less sum than is stated to be due. i. ib.
 5. An action of debt on a promissory note payable by instalments, will not lie till the last day of payment be past. *Rudder v. Price*, Hil. 31 Geo. 3. i. 547
 6. Where in articles of agreement under a penalty, there are mutual covenants between A. and B. to do certain acts, and also a covenant which goes to the whole consideration on each side, to an action of debt for the penalty brought by A. against B. on account of the non-performance of his part, B. may plead in bar a breach by A. of the covenant which goes to the whole consideration. *The Duke of St. Alban's v. Shore*, Trin. 29 Geo. 3. i. 270
 7. So that where in articles of agreement for the sale of lands, it was agreed that A. the seller should take, in part of payment, a conveyance of other lands belonging to B. the buyer, and it was also agreed "that all timber trees which were upon any of the estates should be valued by appraisers, and paid for by the respective purchasers at a given time;" to an action of debt brought by A. against B. for the penalty, on his refusal to complete the purchase, B. pleaded that A. before the time cut down a certain number of trees, &c. i. 270
 8. To entitle himself to a penalty, the plaintiff must shew a strict performance on his part. i. ib.
 9. *Q.* A. having covenanted to make a good title to B. at his expence, whether it be a good averment that A. was capable, ready, and willing to make a good title, if B. would have prepared the conveyances? i. ib.
 10. *Q.* Also, whether a breach was well assigned, stating that B. did not nor would accept the title; whether it ought not to have been shewn that A. tendered a good title to him, which he refused? i. ib.
 11. But where there are mutual covenants which do not go to the whole consideration, the breach of one cannot be pleaded in bar to an action for the breach of the other. *Boone v. Eyre*, B. R. East. 17 Geo. 3. l. n. 273
- [See post. No. 26. 37.]
12. In trespass, a plea of justification stating that a public highway led from another highway (leading from A. to B.) in, through, over, and along the locus in quo, to a certain other highway, (leading from C. to D.) was well supported by evidence, proving that the way in question led from the terminus à quo, viz. the way leading from A. to B. over the locus in quo to a different way called E. and along that way into the way leading from C. to D. the terminus ad quem. *Rouse v. Bardin and Others*, Hil. 30 Geo. 3. i. 351
 13. In pleading a public highway, it is not necessary to state any termini. i. ib.
 14. In *Quare impedit*, the plaintiff having stated his title in the declaration, the defendant pleads his own title in bar, in deducing which, several incidental points are also stated: the plaintiff in the replication sets forth essential matter, which would fully avoid the defendant's title, but does it by way of inducement to a traverse of one of those incidental points, with

- with which traverse the replication concludes; the defendant in the rejoinder takes no notice of the traverse in the replication, but *traverses the matter of inducement* which precedes it. This rejoinder is good, and may well *pass by the traverse* in the replication, that *traverse being an immaterial one*. *Thrale and Others v. The Bishop of London and Others*, East. 30 Geo. 3. i. 376
15. In pleading a right in co-parceners to present to an advowson by turns, it is good to state that the right arose because they did *not* agree to present. i. *ib.*
16. In a *Quare impedit* brought against *A.* and *B.* tenants in common of an advowson (being assignees of two co-parceners, who do not agree to present) *A.* suffers judgment by default, and *B.* dies pending the writ. This judgment is a bar to another *Quare impedit* brought by *A.* and *C.* the representative of *B.* (in which *A.* is summoned and severed) to recover the same presentation, but is not a bar to *C.*'s right to recover on the next avoidance in his turn. *Barker and Another v. the Bishop of London and Others*, Mic. 26 Geo. 2. i. n. 412
17. The bankruptcy of the defendant cannot be pleaded in bar to an action of covenant for rent, on an express covenant. *Mills v. Auriol*, Trin. 30 Geo. 3. i. 433
- N. B. The judgment in this case was affirmed by the court of King's Bench on a writ of error. See 4 *Term Rep. B. R.* 94.
18. In trespass for breaking and entering the plaintiff's house, and *expelling him* from it, a justification as to the breaking and entering will cover the whole declaration, for the expulsion is to be considered as mere matter of aggravation, and not as making the defendant a trespasser *ab initio*, unless the plaintiff insist upon it as a substantive trespass, by a *replication or new assignment*. *Taylor v. Cole and Another*, in the Exchequer Chamber, in error. Hil. 31 Geo. 3. i. 555
19. Where in an action of *assumpsit* on a bill of exchange with the usual money counts, the defendant pleads *nil debet* to the count on the bill, but does not plead at all to the other counts, after a verdict for the plaintiff, the defendant shall not take advantage of his own misleading in arrest of judgment. *Harvey v. Richards*, Trin. 31 Geo. 3. i. 644
20. *A.* being possessed of a term of years, conveys it by way of mortgage, and joins with the mortgagee in a lease for a shorter term, *according to their respective estates and interests*, and the lessee covenants with the mortgagor and his assigns to pay rent and repair. During the lease the term with all the estate and interest of mortgagor and mortgagee becomes vested in the assignee of the reversion. The mortgagor may afterwards maintain an action of covenant against the lessee, the covenants being in gross. *Russell v. Stokes*, in error, in the Exchequer Chamber, Hil. 31 Geo. 3. i. 562
21. *A.* being possessed of a quantity of land in a common field, and having a right of common over the whole field, and *B.* having also a right of common over the whole field, they enter into an agreement, for their mutual advantage and convenience, not to exercise their respective rights for a certain term of years, and each covenants to that effect. If during the term the cattle of *B.* come upon the land of *A.*, he may distrain them damage feasant; for the general rule, that one commoner cannot distrain the cattle of another, is superseded by the special agreement; by which (with regard to *A.*) *B.* became a stranger: and *A.* may in his replication, (in answer to a plea pleaded by *B.* of his right of common, in bar of the cognizance of *A.*) set forth the special circumstances of the agreement and covenants, and leave the construction of them to the court. *Whiteman*

Whiteman v. King, Mic. 32 Geo. 3.
ii. 4

22. To an action brought by a simple contract creditor against an executor *de son tort* of an intestate, the executor cannot plead that *after action brought*, but *before plea pleaded*, he delivered over the effects to the rightful administrator, though in fact no administration was granted till after the action was brought: nor can he plead a retainer for his own debt of a superior degree, with the assent of the administrator. *Vernon v. Curtis, in the Exchequer Chamber, in error, Hil. 32 Geo. 3.* ii. 18

23. Bail above may justify the breaking and entering the house of *A.* the outer door being open, in which the principal resides, in order to seek for him, for the purpose of rendering him. *Sheers v. Brooks, Mic. 33 Geo. 3.* ii. 120

24. Such a justification is good without averring that the principal was in the house at the time. ii. *ib.*

25. And in such a plea an averment that the defendants "duly became bail and entered into a recognizance" is sufficient without stating that the principal was delivered to their custody. ii. *ib.*

26. By the conditions of the sale of a copyhold estate, it was stipulated that the purchaser should pay down a deposit, and sign an agreement for the payment of the residue of the purchase money at a certain time, *on having a good title*, and that he should have a *proper surrender*, on payment of that residue. In an action brought by the seller for the non-performance of the conditions on the part of the purchaser, it was not sufficient to state that the seller had been *always ready and willing and frequently offered to make a proper surrender on payment of the purchase-money*. But the declaration ought to have averred that the seller *actually made a good title and surrendered the estate to the purchaser, or a tender and refusal*, and also to have shewn what

title the seller had. Phillips v. Fielding, Mic. 33 Geo. 3. ii. 123

27. A replication to a plea of "*ne unques accouple*" in dower, alleging a marriage in *Scotland*, may conclude to the country, and in such replication it is not necessary to state that the marriage was had at any place in *England*, by way of venue. *Ilderton v. Ilderton, Trin. 33 Geo. 3.* ii. 145

28. To an action of trespass for fishing in the plaintiff's fishery, the defendant pleaded that the *locus in quo* was an arm of the sea, in which every subject of the realm had the liberty and privilege of free fishing. The plaintiff replied a prescription for the sole and several right of fishing, and traversed that every subject had the liberty and privilege of free fishing in the *locus in quo*. This was a *bad traverse*. The defendant therefore might well pass it by in the rejoinder, and traverse the prescriptive right of the plaintiff stated in the replication. *Richardson v. the Mayor and Commonalty of Orford, in the Exchequer Chamber, in error, Trin. 33 Geo. 3.* ii. 182

29. A prescription for common of pasture for a certain number of sheep on *A.* every year, at all times of the year, is well laid, though the evidence which proves the right of common, proves also that the tenant of a certain farm has a right to have the sheep folded at night on the farm after they have fed on the common during the day. *Brook v. Willet, Mic. 34 Geo. 3.* ii. 224

30. Where in pleading a conveyance, it was stated that a release was cancelled by the seal of the releasor being taken off and destroyed, or lost, with a profert of the residue, it was holden to be good. *Bolton v. the Bishop of Carlisle, Mic. 34 Geo. 3.* ii. 259

31. The omitting to state the consideration of a bargain and sale cannot be taken advantage of on a general demurrer. ii. *ib.*

32. To an action of debt on a bond given

- given to secure an annuity, the defendant pleaded that no *such* memorial was inrolled, as is required by the statute; the replication stated that a memorial was inrolled, containing the particulars which the statute directs; the rejoinder alleged, that the memorial in the replication mentioned did not truly set forth the consideration on which the annuity was granted. This was clearly a *departure* from the plea. *Duchess of Cumberland v. Praed, in the Exchequer Chamber, in error, Hil. 34 Geo. 3.* ii. 280
33. It is not assignable for error, that the plaintiff is adjudged to be in *misericordia* instead of the defendant. *A.* having recovered judgment against *B.* and a *fi. fa.* being delivered to the sheriff, in consideration that *A.* at the special instance and request of *C.* had requested the sheriff not to execute the writ, *C.* promised to pay *A.* the debt and costs, together with the sheriff's poundage, bailiff's fees and other charges. On a judgment by default and error brought, the promise was holden to be binding on *C.* though it was not averred that the sheriff did in fact desist from the execution, nor what the amount of the poundage, &c. was, nor that the defendant had notice of such amount. *Pullin v. Stokes, in the Exchequer Chamber, in error, Trin. 34 Geo. 3.* ii. 312
34. If a plea of foreign attachment state the custom to be, "*that if any person be or hath been indebted to any other person within the said city*", &c. it ought to aver that the defendant in the plaint was indebted to the plaintiff within the city. *Morris v. Ludlam, Mic. 35 Geo. 3.* ii. 362
35. *A.*, having privilege of parliament, owes *B.* a sum of money, for which *B.* sues him; in consequence of which, *C.* enters into a bond together with *A.*, conditioned for the payment to *B.* of such sum as *B.* shall recover in the action against *A.*, in pursuance of the stat. 4 Geo. 3. c. 33. In that action *B.* obtains judgment, and puts the bond in suit against *C.* To the action on the bond, *C.* being under terms by a judge's order to *plead issuably*, may plead in bar that a writ of error is depending on the judgment against *A.* *Curling v. Innes, Mic. 35 Geo. 3.* ii. 372
36. One tenant in common cannot avow alone for taking cattle damage-feasant, but he ought also to make cognizance as bailiff of his companion. *Culley v. Spearman, Hil. 35 Geo. 3.* ii. 386
37. *A.* covenants to build a house for *B.* and finish it on or before a certain day, in consideration of a sum of money, which *B.* covenants to pay *A.* by instalments, as the building shall proceed. The finishing the house is not a condition precedent to the paying the money, but the covenants are independent. *A.* therefore may maintain an action of debt against *B.* for the whole sum, though the building be not finished at the time appointed. *Terry v. Dantz, Hil. 35 Geo. 3.* ii. 389
38. An action on the case, and not an action of trespass, is the proper remedy for an injury done to the plaintiff's carriage, by the servant of the defendant negligently driving his carriage against it. *Morley v. Gaisford, East. 35 Geo. 3.* ii. 442
39. A plea in bar of an avowry for taking cattle damage-feasant, that the cattle escaped from a public highway into the *locus in quo*, through the defects of fences, must shew that they were passing on the highway when they escaped; it is not sufficient to state that being in the highway they escaped. *Dovaston v. Payne, Trin. 35 Geo. 3.* ii. 527
40. To an action brought by the assignees of an insolvent debtor, to recover money owing to him before his insolvency, in which the plaintiffs declare, that in consideration of the money being due to the insolvent, the defendant promised to pay them as assignees, it is a *bad plea* to say, "that the cause of action first accrued

"crued to the insolvent before the
"plaintiffs became assignees, and
"that six years had elapsed after the
"cause of action first accrued to the
"insolvent, and before the suing out
"the writ of the plaintiffs." *Kinder*
v. Paris, Mic. 36 Geo. 3. ii. 561

41. *Qu.* Whether in such case the de-
fendant might plead, that the money
was first due to the insolvent more
than six years before the action was
brought, and that he had made no *ex-*
press promise to the plaintiffs within
six years? ii. *ib.*

42. *Qu.* also, whether in such an action
the plaintiff must prove an *express*
promise? ii. *ib.*

POLICY OF INSURANCE.

See DEED, No. 2. PARTNERS, No. 4.

1. A policy of insurance must specify
the names of all the parties interest-
ed, according to *stat.* 25 Geo. 3. c. 44.
Camden and Others v. Edie, Trin. 28
Geo. 3. i. 21

2. *S.P. Wilton and Others v. Reaston*,
Sittings at Guildhall after Mic. 25
Geo. 3. *coram Buller, J.* i. n. 22

3. A policy of insurance is effected on
certain goods on board a certain ship
on a voyage *at and from A. to B.*, and
another policy is also made on any
kind of goods as interest should ap-
pear, *on board ship or ships*, on the
same voyage, warranted to sail with-
in a limited time, but no circum-
stances relating to the first policy are
communicated to the underwriters
of the second, nor do they know
that the first was made. Goods to
the full amount of the sum insured
in the first policy are put on board
the specified ship, which arrives in
safety. Goods to the full amount of
the sum insured in the second policy
are put on board another ship, which
sails within a limited time from *A.*
with an intention to touch at C., in her
course to B., but is lost before she ar-
rives at the deviating points. The un-
derwriters of the second policy are
answerable for the loss. *Kewley v.*
Ryan, Trin. 34 Geo. 3. ii. 343

4. Two policies of insurance for dif-
ferent sums are effected on goods on
board *any ship or ships* on a voyage
from *A. to B.*; goods nearly amount-
ing to the value of both policies are
put in different proportions on board
two ships which sail on the voyage,
one of which is lost, but the other
arrives in safety at *B.* The insured
may apply either policy to the ship
which is lost. *Henchman v. Offley*,
B. R. Mic. 23 Geo. 3.

ii. 345. *in notis.*

5. A policy of insurance is made on a
ship, on a voyage from *A. to C.* war-
ranted to depart with *convoy for the*
voyage. The convoy appointed is to
B. a port in the course, and near to
C. This is a compliance with the
warranty, and the underwriters are
liable, the ship being captured in the
passage from *B. to C.* *D'Eguino v.*
Bewicke, Mic. 36 Geo. 3. ii. 551

6. The term *convoy* in a policy means
such a convoy as shall be appointed
by government. ii. *ib.*

7. A policy of insurance against fire
under seal, refers to certain proposals
distinct from the deed, which declare
that all persons insured, sustaining
any loss by fire shall (among other
things) produce a certificate under
the hands of the minister and church-
wardens, and some respectable house-
holders of the parish, importing that
they are acquainted with the charac-
ter and circumstances of the person
insured, and know or verily believe
that the loss really happened by mis-
fortune, without any fraud or evil
practice. ii. 574

8. *Qu.* Whether the production of a
certificate so signed be a condition
precedent to a recovery against the
insurers on the policy? Or, whether
it be not sufficient to shew that a
certificate was produced and signed
by many reputable householders of
the parish, and that the minister and
churchwardens being applied to
without *any reasonable or probable*
cause, wrongfully and unjustly refused
to sign it. *Wood v. Worsley*, Mic. 36
Geo. 3. ii. *ib.*

9. *N.B.*

9. *N.B.* The judgment in this case was reversed by the Court of *B. R.* on a writ of error, *Trin.* 36 *Geo.* 3., that court being of opinion that it was necessary to produce a certificate signed by the minister and churchwardens. [6 *Term Rep. B. R.* 710.]

POOR.

See **BASTARDY.** **GLEANNING**, No. 2.

POOR RATE.

The ranger of a royal park is rateable to the poor, in respect of inclosed and cultivated lands within the park, if he is in the enjoyment of the immediate profits of those lands, for as to those profits he is considered as an occupier of the lands. *Earl of Bute v. Grindall, in the Exchequer Chamber, in error, Mic.* 34 *Geo.* 3. ii. 265

POST-OBIT BOND.

See **PRACTICE**, No. 56.

PRACTICE.

See **AMENDMENT.** **ANNUITY.** **ATTACHMENT OF CONTEMPT.** **ATTORNEYS.** **BAIL.** **COSTS.** **PAYMENT OF MONEY INTO COURT.** **REQUESTS, COURT OF**, No. 2, 3, 4, 5, 6. **RULES.** ii. 386

1. The return day of a *clausum fregit*, and the *4to die post*, are both reckoned inclusively. *Fano v. Coken, East.* 28 *Geo.* 3. i. 9
2. There is no difference, as to that point, whether the return day be *Sunday* or any other day. i. *ib.*
3. Where issue is joined early enough in a term, notice of trial must be given in the same term. *Frampton v. Payne, Trin.* 28 *Geo.* 3. i. 65
4. The plaintiff has the whole of the term next after that in which issue is joined, to try his cause in. *Baker v. Newman, Hil.* 29 *Geo.* 3. i. 123
See *post.* No. 51. and tit. **AFFIDAVIT**, No. 8, 9.
5. Where the plaintiff does not declare, after having obtained time for that

purpose, the defendant may sign judgment of *non pros.* without giving a rule to declare. *Towes v. Powell and Ux. Mic.* 29 *Geo.* 3. i. 87

6. The notice to appear annexed to common process, must contain the name of the defendant on whom it is served. *Worgman v. Plank, Hil.* 29 *Geo.* 3. i. 100
7. Such notice to appear on the *4to die post* is good. *Sumner v. Brady and Others, East.* 31 *Geo.* 3. i. 630
8. Service of notice of declaration on a *Sunday* is bad, though the defendant accept it, knowing it to be irregular. *Morgan v. Johnson, East.* 31 *Geo.* 3. i. 628
9. Where a plaintiff has once proceeded to trial, judgment as in case of a nonsuit cannot be entered for not proceeding to a new trial. *Porzelius v. Maddocks, Hil.* 29 *Geo.* 3. i. 101
10. The court will not refer a matter which concerns an officer of the court, to the prothonotary for examination. *Johnson v. Smith, Hil.* 29 *Geo.* 3. i. 105
11. Notice of justification of bail is not such a waiver of the default of not giving notice of exception, as to support a rule on the sheriff to bring in the body. *Rogers v. Mapleback, Hil.* 29 *Geo.* 3. i. 106
12. But it is a waiver as between plaintiff and defendant. i. *ib.*
13. It is not necessary to add the name of the filazer to a common *capias.* *Frost v. Eyles and Another, Hil.* 29 *Geo.* 3. i. 120
14. The court will not grant a trial at bar in an issuable term. *The Corporation of London v. Corporation of Lynn, East.* 29 *Geo.* 3. i. 206
15. Although the plaintiff has undertaken peremptorily to proceed to trial at the next assizes, yet the defendant is not bound to attend and be prepared with witnesses, counsel, &c. without having had notice of trial. *Ifield v. Weeks and Another, East.* 29 *Geo.* 3. i. 222
16. Nor will the prothonotary allow him the costs of such attendance and preparation, though he obtain judgment as

- as in case of a nonsuit, on account of the plaintiff's not proceeding to trial. i. 222
17. It is irregular if a *capias* be served after the date of the return, and if there be not fifteen days between the *teste* and return. *Whale v. Fuller, East. 22 Geo. 3.* i. *ib.*
18. But if the defendant take the declaration out of the office, he thereby waives all preceding irregularity. i. *ib.*
19. And if there be not fifteen days between the *teste* and return, the court will allow the *teste* to be amended. *Bourchier v. Wittle, Mic. 30 Geo. 3.* i. 291
20. Where the defendant is joined with his wife in the writ, he may enter an appearance for himself only. *Clark v. Norris et Ux. East. 29 Geo. 3.* i. 236
21. And in such case the plaintiff cannot sign judgment for want of a plea without demanding a plea. i. *ib.*
22. If a declaration be delivered against a prisoner as such, after he has obtained a *supersedeas*, it is irregular. *Gehegan v. Harper, Trin. 29 Geo. 3.* i. 251
23. But he cannot take advantage of the irregularity unless he apply to the court in due time. i. *ib.*
24. The plaintiff having added the *similiter* to the replication, and delivered the issue to the defendant, who accepts it, but does not pay the issue money, judgment may be signed by the plaintiff, without giving a rule to rejoin. *Boone v. Eyre, Trin. 29 Geo. 3.* i. 254
25. It is not sufficient cause for the plaintiff to shew against changing the *venue*, that the cause of action arose where the *venue* is laid. *French v. Copinger and Another, East. 29 Geo. 3.* i. 216
26. But he must also undertake to give material evidence at the place. i. *ib.*
27. An undertaking of the plaintiff to give material evidence where the *venue* is laid, may be supported by proof of the cause of action being in a foreign country. *Gerard v. De Robec and Another, Trin. 29 Geo. 3.* i. 280
28. But it is not sufficient cause for him to shew against changing the *venue*, that the cause of action arose in a foreign country. *Ib. and Woolnorgh v. Boys, Mic. 25 Geo. 3.* there cited. i. *ib.*
29. The plaint in replevin being removed by the defendant into this court, by *re. fa. lo.* which is filed on the appearance day of the return, and a rule to declare being given, he may sign judgment of *non pros.* for want of a declaration, without demanding a declaration. *James v. Moody, Trin. 29 Geo. 3.* i. 281
30. A plea of tender may be pleaded after a judge's order for time to plead has been obtained. *Noone v. Smith, East. 30 Geo. 3.* i. 369
31. Though a writ of error may be brought on a judgment of nonsuit, the court will not in any case stay proceedings or set aside an execution for the costs on that account. *Box v. Bennett, East. 30 Geo. 3.* i. 432
32. Although notice has been given of a motion for judgment as in case of a nonsuit, for not proceeding to trial in due time after issue joined, on which the plaintiff enters into a peremptory undertaking to try, yet notice must also be given of the like motion for not proceeding to trial in pursuance of the undertaking. *Gooch v. Pearson, Mic. 31 Geo. 3.* i. 527
33. Where process is returnable on the *last return* of a term, a declaration *de bene esse* may be filed, with notice to plead within the four first days of the next term. *Abbey v. Martin, Mic. 31 Geo. 3.* i. 533
34. Where a verdict is given for a greater sum than the amount of the damages laid in the declaration, and for that cause a writ of error is brought, the court will permit the plaintiff to enter a *remittitur* of the excess above the sum laid in the declaration, on payment of the costs of the writ of error. *Pickwood v. Wright, Trin. 31 Geo. 3.* i. 643
35. Service of a declaration in ejectment

- ment before the essoign day of a term, on the daughter of the tenant in possession, in the absence of the tenant and his wife, is good, provided it appear that the daughter delivered it to the wife, though it should not appear that such delivery was before the essoign day. *Smith, on the dem. of Lord Stourton and Others, v. Hurst, Trin. 31 Geo. 3.* i. 644
36. Where judgment has not been entered within a year and a day, on a warrant of attorney given with a *post-obit* bond, and the obligee does not apply for leave to enter it till after the death of the person on whose death it is payable, the court will not grant leave without a rule to shew cause. *Lushington v. Waller, Mic. 29 Geo. 3.* i. 94
37. The court will not receive the affidavit of an attorney's clerk to put off a trial, unless it be stated that the clerk was particularly acquainted with the circumstances of the cause and had the management of it. *Sullivan v. Magill, East. 31 Geo. 3.* i. 637
38. If a person be arrested after the writ is returnable, the officer cannot legally detain him (though for the shortest time) till the writ be continued. *Loveridge v. Plaistow, East. 32 Geo. 3.* ii. 29
39. The court will not set aside an execution issued on a judgment after notice of a writ of error, if it appear from the admission of the defendant's attorney, that the writ of error was brought merely for delay. *Mitchell v. Wheeler, East. 32 Geo. 3.* ii. 30
40. Time to plead under a judge's order is reckoned *inclusive* of the day of the date of the order, but *exclusive* of the day on which it expires. *Kay v. Whitehead, East. 32 Geo. 3.* ii. 35
41. Of the four days allowed to perfect bail in after an exception, the first is reckoned *exclusively*, and the last *inclusively*; so that where the exception was on *Wednesday*, an attachment could not regularly issue against the sheriff till the *Tuesday* following (*Sunday* being no day); but though the attachment did issue on the *Monday*, the court would set it aside, because the *bail was not perfected*. *North v. Evans, East. 33 Geo. 3.* ii. 11
42. Bail sued on the recognizance or attachment of privilege, may read the principal on the appearance day of the return. *Fletcher v. Ainge, Mic. 33 Geo. 3.* ii. 11
- [See *post*. No. 54.]
43. A plaintiff who is resident abroad is compellable to give security for costs, though no other circumstance than his residence be stated in the affidavit. *Ganesford v. Levy, Mic. 33 Geo. 3.* ii. 11
44. A peremptory undertaking to try, alone sufficient cause to shew against judgment as in case of a nonsuit for not proceeding to trial, if it be the first default. *Mallett v. Hilton, Mic. 33 Geo. 3.* ii. 11
- [See No. 47.]
45. The court will set aside an attachment against the sheriff issued on account of bail above not being put in on payment of costs and perfecting bail, where the plaintiff has not been delayed. *Callan v. Tye, Mic. 33 Geo. 3.* ii. 23
46. An attachment against the sheriff is irregular, if the rule to bring in the body issues before the time for putting in bail has expired. But if the sheriff neglect to apply to the court in due time, to set aside the attachment, the irregularity is waived. Where a writ is returnable the first return of a term, in a county cause, the defendant has eight days after the *quarto die post*, to put in bail. *Rafie v. Steele, Hil. 34 Geo. 3.* ii. 27
47. Where the plaintiff does not countermand notice of trial, but withdraws the record, after the cause is called on, the court will make it a condition of discharging a rule for judgment as in case of a nonsuit, (on a peremptory undertaking to try) that he shall pay the defendant the costs incurred by the omitting to try, though the practice of the court is, not to grant a rule for costs for not going on to trial, and also a rule for

- for judgment, as in case of a nonsuit, at the same time. *Jordaine v. Sharpe*, Hil. 34 Geo. 3. ii. 280
48. A clerk to an attorney, though not articulated, cannot be bail to the action. *Cornish v. Ross*, Mic. 35 Geo. 3. ii. 349
49. It is not necessary that a warrant of attorney to confess a judgment should be read over to the party giving it. *Taylor v. Parkinson*, Mic. 35 Geo. 3. ii. 383
50. A foreign seaman having brought an action for his wages against a foreigner, the court refused to compel him to give security for costs on account of his being on a voyage on board an *English* ship. *Henschen v. Garves*, Mic. 35 Geo. 3. ii. *ib.*
51. Judgment as in case of a nonsuit for not proceeding to trial, cannot be moved for till the third term after that in which issue is joined; where the affidavit is general, that issue was joined in that term. *Da Costa v. Ledstone*, Mic. 36 Geo. 3. ii. 558
52. Though a *levari fucias de bonis ecclesiasticis* is a continuing execution, and a levy under it may be made from time to time after it is *returnable*, till the sum indorsed be satisfied, yet if it be *actually returned*, the authority of the bishop is at an end. Therefore where such a writ remained in the hands of the bishop long after it was returnable, who sequestered the profits of a vicarage accruing as well before the return day, as after, and being ruled to return the writ, returned only the amount of the sum, levied up to the *return day*, the court would not order the writ and return to be taken off the file, but would only permit the return to be amended, by inserting the sum levied up to the time when the writ was *actually returned*. *Marsh v. Fawcett*, Mic. 36 Geo. 3. ii. 582
53. After the defendant has agreed to take short notice of trial, the court will not compel the plaintiff, though a foreigner and resident abroad, to give security for costs. *Michel v. Pareski*, Hil. 36 Geo. 3. ii. 593
54. Bail must render the principal before the rising of the court, in order to discharge themselves from an action of debt on the recognizance. *Lardner v. Bassage*, Hil. 36 Geo. 3. ii. 593
55. A plaintiff may sue in his own name, without an attorney, and subscribe the process with his own name as attorney for the plaintiff in any action. *La Grue v. Penny*, Hil. 36 Geo. 3. ii. 600
56. In an action for the penalties of the Lottery Act, 27 Geo. 3. c. 1. s. 2. it is sufficient if the process state the sum to which they amount, as the debt, without describing it as arising from penalties, or specifying the offence, provided there be an affidavit for that purpose: and it is also a sufficient compliance with the *stat.* 33 Geo. 3. c. 62. s. 38. to state in the process that the plaintiff "is appointed by the commissioners of his Majesty's stamp duties to prosecute." *King v. Pacey*, Hil. 36 Geo. 3. ii. 601
57. Though a rule to plead expires on a *dies non juridicus*, *ex. gr.* the *Purification*, the defendant is bound to plead on or before that day, and if he does not, judgment may be signed on the next day. *Mesure v. Britten*, Hil. 36 Geo. 3. ii. 616

PRISONER.

See LORDS' ACT, No. 1. PRACTICE, No. 22.

PRIVILEGE.

See ARREST. PLEADING, No. 35.

PRIZE.

See ADMIRALTY, No. 1, 2, 3, 4, 5.

PROHIBITION.

See ADMIRALTY, No. 1, 2.

1. Where the subject of a suit in an inferior court is within the jurisdiction of that court, though in the proceedings a matter be stated which is out of the jurisdiction, yet unless the court is going on to try such matter, a prohibition will not lie. *Dutens*,

- Clerk, v. Robson, *Hil. 29 Geo. 3.*
i. 100
2. The court will not grant a prohibition to prevent the execution of the sentence of a court martial, passed against *A.* who has *received pay as a soldier*, (but assumed the military character merely for the purpose of recruiting in the usual course of that service,) though the proceedings of the court-martial appear to be in some instances irregular. *Grant v. Sir Charles Gould, Trin. 32 Geo. 3.*
ii. 69
 3. The receiving pay as a soldier subjects the receiver to military jurisdiction.
ii. *ib.*
 4. *Quære*, Whether the misinterpretation of a statute by an inferior court, the consideration of which arises incidentally in the course of a proceeding which is confessed to be within its jurisdiction, be a ground for a *prohibition*? Whether it be not rather a matter of appeal? *Home v. Earl Camden, in the House of Lords, Trin. 35 Geo. 3.*
ii. 533
 5. But clearly in such a case a prohibition will not lie, unless it be made appear to the superior court, that the party applying for the prohibition has, in the course of the proceedings in the inferior court, alleged the grounds for a contrary interpretation of the statute on which he applies for the prohibition, and that the inferior court has proceeded notwithstanding such allegation.
ii. *ib.*
 6. No right is *vested*, by any of the *prize acts*, in the captors of an enemy's ship and cargo in war, *before the ultimate adjudication* of the courts of prize.
ii. *ib.*
 7. The issuing a monition therefore to the prize agents by the court of commissioners of appeals in prize causes, to bring in the proceeds of a ship and cargo, which have been sold, after a sentence of condemnation as lawful prize, but from which sentence there is an appeal, (on a subject distinct from the question, Whether prize or not, which is not disputed,) is not a ground for a prohibition to

that court, for the monition neither interferes with, nor defeats any *vested rights*.
ii. 533

PROMISSORY NOTE.

See BILL OF EXCHANGE, No. 2, 3.
PLEADING, No. 5.

1. *A.* makes a promissory note payable to *B.* or order, which *B.* indorses, having given no value for it, and knowing that *A.* is insolvent: in an action by the indorsee against *B.* it is not necessary to prove that the note was presented for payment to *A.* immediately when it became due, or that notice was given to *B.* of *A.*'s refusal to pay it. *De Berdt v. Atkinson, Trin. 34 Geo. 3.*
ii. 336
2. One of two makers of a joint and several promissory note having become a bankrupt, the payee receives a dividend under the commission on account of the note: this will prevent the other maker from availing himself of the statute of limitations, in an action brought against him for the remainder of the money due on the note: the dividend having been received within six years before the action brought. *Jackson v. Fairbank, Trin. 34 Geo. 3.*
ii. 340
3. *A.* makes a promissory note payable to *B.* or order, with a memorandum upon it that it will be paid at the house of *C.* who is *A.*'s banker: in the course of business the note is indorsed to *C.* In an action by *C.* against the indorser, it is not necessary to prove an actual demand on *A.* *Saunderson v. Judge, East. 35 Geo. 3.*
ii. 509
4. If a note be made payable at a particular house, a demand of payment at that house is as a demand on the maker.
ii. *ib.*
5. The putting a letter into the post-office to the indorser in proper time, informing him that the maker has not paid a note when due, is sufficient evidence of notice to the indorser.
ii. *ib.*
6. *A.* being in insolvent circumstances, *B.* undertakes to be a security for a debt

debt owing from *A.* to *C.* by indorsing a promissory note made by *A.* payable to *B.* at the house of *D.* The note is accordingly so made and indorsed with the knowledge of all parties. Just before it becomes due, *B.* being informed that *D.* has no effects of *A.* in his hands, desires *D.* to send the note to him *B.* and says he will pay it. *C.* cannot maintain an action against *B.* on the note, without having used due diligence in presenting the note as soon as it was due to *D.* for payment, and in giving immediate notice to *B.* of the non-payment by *D.*: for *B.* has a right to insist on the strict rule of law respecting the indorser of a note, notwithstanding the particular circumstances of the case. *Nicholson v. Gouthit*, *Hil.* 36 *Geo.* 3. ii. 609

Q.

QUARE IMPEDIT.

See COSTS, No. 16. PLEADING, No. 14, 15, 16.

Where the grant of a *rectory* by the crown contained an exception of all churches and vicarages thereto belonging, a perpetual curacy belonging to the *rectory* passed by the grant, not being included in the exception. *Arthington and Another v. The Bishop of Chester and Another*, *East.* 30 *Geo.* 3. i. 418

R.

RECOGNIZANCE.

See ADMIRALTY, No. 1.

RECOVERY COMMON.

For rules of court as to suffering, see i. 526, 527.

1. A common recovery is good, though the sheriff return to the writ of seisin

that he delivered seisin on a day prior to the date of the conveyance creating the tenant to the præcipe, where the proceedings are all in the same term, by *stat.* 14 *Geo.* 2. c. 20. *Goodright v. Rigby*, *Trin.* 32 *Geo.* 3.

ii. 46

N. B. The judgment in this case was affirmed on a writ of error by the court of *B.R.* See 5 *Term Rep. B. R.* 177.

2. The affidavit of the acknowledgment of a warrant of attorney to suffer a recovery taken before an ordinary magistrate in a foreign country, must be attested by a notary public. *Ex parte Worsley*, *Mic.* 34 *Geo.* 3.

ii. 275

3. But the court will dispense with such attestation, in the case of an affidavit taken before a great judicial officer in *Ireland*. ii. *ib.*

REMITTITUR OF DAMAGES.

See PRACTICE, No. 34.

REMOVAL OF BUILDINGS, &c.
fixed to the Freehold.

See AGREEMENT, No. 15.

1. Things fixed to the freehold by, and at the expence of the tenant in fee, which are removable, but necessary to the enjoyment of the inheritance, go to the heir, and not to the executor. *Lawton v. Salmon*, *East.* 22 *Geo.* 3. *B. R.* i. n. 259

2. Accordingly, the executor could not recover in trover against the tenant of the heir salt pans erected by the testator and fixed to the floor in salt works, but removable, without which the salt works were of no value. i. *ib.*

REPAIRS.

See ACTION ON THE CASE.

REPLEVIN.

See AGREEMENT, No. 16. COSTS, No. 30. PAYMENT INTO COURT. No. 1. PLEADING,

PLEADING, No. 21. 36. 39. PRACTICE, No. 30.

1. In an action on the case against a sheriff for taking insufficient *sureties* in a *replevin bond*, the plaintiff may recover damages beyond the penalty of the bond, *i. e.* for more than double the value of the goods distrained. *Concanen v. Lethbridge, East. 32 Geo. 3. ii. 36*—But by a subsequent determination,
2. In an action on the case against the sheriff for taking insufficient *pledges* in replevin, he is liable to the extent of *double the value* of the goods distrained, but no farther. *Evans v. Brander, Trin. 35 Geo. 3. ii. 547*

REQUESTS, COURT OF.

1. The *Southwark Court of Requests* act, 22 Geo. 3. c. 47. cannot be pleaded to an action brought in a superior court. *Barney v. Tubb, Mic. 35 Geo. 3. ii. 352*
2. The proper mode for the defendant to avail himself of it, is by *entering a suggestion* on the record, after verdict, or the execution of a writ of inquiry. *ii. ib.*
3. Where the plaintiff having obtained judgment on a general demurrer to such a plea, executed a writ of inquiry, on which the damages were assessed at less than 40s. five days before the end of the term, and signed final judgment on the last day of the term, the court in the next term refused to direct the prothonotary to review his taxation of costs to the plaintiff, on an affidavit stating the former proceedings, and that the defendant was *resiant* within the jurisdiction of the inferior court; because the defendant ought to have entered a suggestion, and that before final judgment was signed. *ii. ib.*
4. And to entitle himself to such a suggestion, supposing it to be moved for in time, the defendant must state in the affidavit, not only that he is *resiant* within the jurisdiction of, but also that he is *liable to be warned or*

summoned to the Court of Requests.
ii. 523

5. After judgment by default the defendant is *still in court* for many purposes, one of which is that of entering such suggestion. *ii. ib.*
6. *Semble* that judgment on a general demurrer to a plea in bar, the matter of which, even if well pleaded, would be no defence to the action, is to be considered as a judgment by default. *ii. ib.*

RIGHT, WRIT OF.

See PLEADING, No. 1.

RULES OF COURT.

1. Regulating the time when bail bonds shall be put in suit. *Trin. 30 Geo. 3. i. 527*
2. Respecting the writ of covenant, on levying a fine; the writ of entry on suffering a recovery at bar; and the *allocatur* of the judge, where warrants of attorney of the parties to a recovery are taken under a *dedimus potestatem*. *i. ib. and 527 amended.*

S.

SEAMEN'S WAGES.

1. Foreign seamen at a foreign port enter into articles with the master, who is also a foreigner, for a voyage on board a foreign ship, and thereby agree, among other things, not to institute any suit against the master in foreign countries, or cite him before any judge or magistrate, but that they will abide by the maritime code of their own country, and the adjudication of their own courts. Having made this agreement in their own country, they cannot maintain an action in *England* against the master for wages, though the ship and cargo be confiscated in an *English* port, and the voyage thereby ended. *Giener v. Meyer, Hil. 36 Geo. 3. ii. 603*
2. A seamen belonging to a merchant-ship,

ship, which is articted for a certain voyage, is prevented from performing the whole voyage, by being disabled by an accident happening in the course of his duty: he is entitled to wages for the whole voyage. *Chandler v. Grieves*, *Hil. 32 Geo. 3.*
ii. 606. *in notis.*

SECURITY FOR COSTS.

See COSTS, No. 2. 4. 9. 13.

SERVANT.

See PLEADING, No. 19.

SET-OFF.

See COSTS, No. 2. 9, 10.

SHERIFF.

See ATTACHMENT, No. 1. 3. 5, 6, 7.
PRACTICE, No. 11.

SHIP.

See AGREEMENT, No. 5, 6.

SLANDER.

See WORDS, No. 1.

Where in an action for slander, some of the counts in the declaration are for actionable words, and others for words not actionable, and special damage is laid referring to all the counts, and the plaintiff has a verdict on the whole declaration, though the damages recovered be less than 40s. he is intitled to full costs. *Savile v. Jardine*, *Trin. 35 Geo. 3.*
ii. 531

SLAVE.

An infant slave in the *West Indies* executed an indenture, by which he covenanted to serve *B.* for a certain term of years as his *servant*, and *B.* covenanted to do certain things on his part. *B.* then came to *England* with the slave. In an action against *A.* who had seduced him from the

service of *B.*, *A.* was not permitted to allege that the contract was void as being made by an infant and a slave, and therefore that the declaration, which stated him to have been retained as a servant for a term of years was not proved, for the court held that the *effect of such a contract* might be the *manumission* of the slave, and consequently that it was for his own benefit, and therefore that it was, at most, only voidable by the infant himself. *Keane v. Boycott*, *East. 35 Geo. 3.*
ii. 511

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See PROHIBITION, No. 1, 2.

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See BILL OF LADING.

SUGGESTION.

SUGGESTION.

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T.

TENANTS IN COMMON.

See PLEADING, No. 36.

TENDER, PLEA OF.

See PRACTICE, No. 30.

TOLL, EXEMPTION FROM.

See LONDON.

The writ *de essendo quietum de Theolonia*, is not merely prohibitory, but remedial, on which the parties may plead to issue on a question of right. *Corporation of London v. the Corporation of Lynn, East.* 29 Geo. 3.

i. 206

N. B. The judgment in this case was reversed by the Court of King's Bench, on a writ of error. *Hil.* 31 Geo. 3. See 4 Term Rep. B. R. 130.—But this judgment of the Court of K. B. was reversed in the House of Lords. 1 Bos. & Pull. 487.

TRIAL.

See PRACTICE, No. 3, 4. 9. 14. 15. 32.

U.

USE AND OCCUPATION.

A tenant from year to year of a house at a yearly rent becomes a bankrupt in the middle of the year, and his assignees enter and keep possession for the remainder of the year. The lessor cannot maintain an action for use and occupation against the assignees for the bankrupt's occupation as well as their own, without proving their *special interest and request* for the bankrupt to occupy during the time that elapsed before his bankruptcy. *Naish v. Tatlock, Trin.* 34 Geo. 3.

ii. 319

USURY.

See AGREEMENT, No. 9.

1. A *bonâ fide* debt is not destroyed by being mingled with an usurious contract relating to it. *Gray v. Fowler, Trin.* 30 Geo. 3. i. 462
2. A memorandum indorsed on a bond, which was conditioned for the payment of 100*l.* by quarterly payments of 5*l.* each, and interest at 5*l.* per cent. "that at the end of each year, "the year's interest due was to be "added to the principal, and then "the 20*l.* received in the course of "the year was to be deducted, and "the balance to remain as principal, "and so continue yearly till both "principal and interest were fully "paid," was not usurious, particularly as the consideration of the bond was the giving up an annuity, and not a loan of money. *Hamilton v. Le Grange, in the Exchequer Chamber, in error, Trin.* 33 Geo. 3. ii. 144

V.

VARIANCE.

See BAIL, No. 5. SLAVE.

1. In an action for amercement in a court leet, if the declaration state the court to have been holden before the *steward* of the manor, but the evidence prove it to have been holden before the *deputy steward*, it is a fatal variance. *Wyvill, Clerk, v. Shepherd, Hil.* 29 Geo. 3. i. 162
2. S. P. Where the declaration stated that the defendant was summoned to serve on the jury of the court-leet and *court-baron*, but the summons was to serve on the jury of the *court-leet only*. *Gery v. Wheatly, Sittings after Mic.* 17 Geo. 3. *West. coram Lord Mansfield.* i. n. 163
3. In an action on a judgment if the declaration state the judgment to have been recovered in a term different from that which appears on the record, it is a *failer of record*.—

It

It is also a variance, if the declaration states the judgment against *one* defendant only, when it was against *more than one*. *Rastall v. Stratton*, Trin. 28 Geo. 3. i. 49

4. In an action for bribery on the *stat. 2 Geo. 2. c. 24.* it is not a material variance, if the declaration state the precept to have issued to the bailiffs of a borough, but the precept produced in evidence is directed to the bailiff. *Warre v. Harbin*, Trin. 32 Geo. 3. ii. 113

5. A prescription for common of pasture, for a certain number of sheep on *A.* every year, at *all times of the year*, is well laid, though the evidence which proves the right of common, proves also that the tenant of a certain farm has a right to have the sheep folded at night on his farm, after they have fed on the common during the day. *Brooke v. Willet*, Mic. 34 Geo. 3. ii. 224

6. An avowry for an increased rent on a demise for every acre of the land which should be converted into tillage, is supported (under *stat. 11 Geo. 2. c. 19.*) by the evidence of a lease for a term of years, with a covenant to pay the increased rent for every acre which should be so converted *during a part of the term*, e. g. for the last three years: and the variance is immaterial. *Roulston v. Clarke & al.* Mic. 36 Geo. 3. ii. 563

VENUE.

See DOWER, No. 2.

VERDICT.

See PRACTICE, No. 34.

The court will not alter a verdict, unless it appear on the face of it that the alteration would be according to the intention of the jury. *Spencer v. Goter*, Mic. 29 Geo. 3. i. 78

VOIDABLE CONTRACT.

See SLAVE.

W.

WAGER.

No action will lie on a *wager* respecting the *mode of playing* an illegal game; and if such a cause be set down for trial, the judges at *Nisi Prius* will order it to be struck out of the paper. *Browne v. Leeson*, Trin. 32 Geo. 3. ii. 43

WAGES.

See SEAMEN'S WAGES.

WARRANT OF ATTORNEY.

See INFANT. PRACTICE, No. 36.

WARRANTY.

1. Where a horse has been sold *warranted sound*, which it can be clearly proved *was unsound at the time of the sale*, the seller is liable to an action on the warranty, *without* either the horse *being returned*, or *notice given* of the unsoundness. *Fielder v. Sar-kin*, Trin. 28 Geo. 3. i. 17
2. Though on the sale of a horse there is an express warranty by the seller, that the horse is sound, free from vice, &c., yet if it is accompanied with an undertaking on the part of the seller to take the horse again, and pay back the money, if *on trial* he shall be found to have any of the defects mentioned in the warranty, the buyer must return the horse as soon as he discovers any of those defects, in order to maintain an action on the warranty, unless he has been induced to prolong the trial by any subsequent misrepresentation of the seller. In such case a trial means a *reasonable trial*. *Adams v. Richards*, Mic. 36 Geo. 3. ii. 573

WASTE.

See AGREEMENT, No. 15.

WEST

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WEST INDIES.

See BANKRUPT, No. 14.

WITNESS.

See ATTACHMENT OF CONTEMPT,
No. 2. EVIDENCE, No. 2.

WORDS.

The simply saying to another "you
" a *swindler*" is not actionable.
ville v. Jardine, Trin. 35 Geo. 3.
ii.

THE END.



